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v. 2923 No. 14629

United States
Court of Appeals
for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,

vs.

CLARA STINTZI, Guardian Ad Litem for Gerald Stintzi, a minor, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 464, inclusive.)

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California 2-25-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Transcript of Proceedings—(Continued)

Witnesses for Plaintiff:

Transcript of Proceedings—(Continued)

Witnesses for Defendant:

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Defendant-Appellant.

In the United States District Court for the Eastern District of Washington, Northern Division

No. 1052

CLARA STINTZI, Guardian Ad Litem for GERALD STINTZI, a minor, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Defendant.

PETITION FOR REMOVAL

To the United States District Court for the Eastern District of Washington, Northern Division:

Comes now the Defendant in the above entitled action and files this, its petition for removal of this cause from the Superior Court of the State of Washington, Spokane County, in which it is now pending, to the District Court of the United States, in and for the Northern Division of the Eastern District of Washington, held in the City of Spokane, in said District and State, and shows to the Court the following facts:

I.

That this cause was commenced in the Superior Court of Spokane County, State of Washington, and that a Summons and Complaint were served upon the Defendant and Petitioner herein on July 30, 1952, which Complaint set forth the claim for relief upon which the action is based; that the

Plaintiff and Defendant, through their respective counsel, have stipulated that the Defendant may have up to and including the 30th day of August, 1952, within which to appear in said action in the Superior Court of the State of Washington, in and for Spokane County, and/or to remove said action to the District Court of the United States for the Eastern District of Washington, Northern Division, as per copy of the attached stipulation, attached hereto and made a part hereof. [1*]

II.

That the action is one of a civil nature over which the District Courts of the United States have original jurisdiction, the said action having been brought by the Plaintiff against the Defendant for damages alleged to have been sustained by the Plaintiff as a result of being hurt in an accident when he was injured by a movement of some of Defendant's equipment.

III.

That the matter in dispute exceeds the sum of $3,000.00, exclusive of interest and costs, the suit being for the sum of $160,000.00, as will more fully appear by Plaintiff's Complaint, a copy of which is hereto attached and which is here referred to and made a part hereof.

IV.

That at the time of the commencement of this

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* Page numbers appearing at foot of page of original Transcript of Record.

action and since that time the Plaintiff was and is now a citizen and resident of the State of Washington and of the County of Spokane in said State of Washington, and the Defendant, Northern Pacific Railway Company, a corporation, was and still is a corporation, incorporated and existing under and by virtue of the laws of the State of Wisconsin, and is a citizen and resident of said State of Wisconsin, and is not now and was not at the time of the institution of the action, nor at any time, a citizen and resident of the State of Washington.

V.

That the Defendant files herewith a bond with a good and sufficient surety for paying all costs and disbursements incurred by reason of these removal proceedings, if this Court should hold that the action was not removable or improperly removed thereto, as provided by the statutes of the United States. [2]

Wherefore, your Petitioner prays for removal of the above entitled cause from the said State Court to this Court.

Dated at Spokane, Washington, this 29th day of August, 1952.

CANNON, McKEVITT & FRASER,
/s/ By FRANK J. McKEVITT,
Attorneys for Petitioner
CASHATT & TURNER,
/s/ By LEO N. CASHATT,
Attorneys for Petitioner

Duly Verified. [3]

In the Superior Court of the State of Washington in and for the County of Spokane

No. 134044

Clara Stintzi, Guardian ad Litem for Gerald Stintzi, a minor, Plaintiff, vs. Northern Pacific Railway Company, a corporation, Defendant.

STIPULATION

It Is Hereby Stipulated by and between the above entitled parties, through their respective attorneys, that the defendant in this action may have to and including the 30th day of August, 1952, within which to appear in said action in the Superior Court of the State of Washington, in and for Spokane County, and/or to remove said action to the District Court of the United States for the Eastern District of Washington, Northern Division.

Dated at Spokane, Washington, this 18th day of August, 1952.

KEITH, WINSTON, MacGILLIVRAY & REPSOLD,
JOHN T. DAY,
Attorneys for Plaintiff [4]

COMPLAINT

Plaintiff complains:

I.

Clara Stintzi is the mother and duly appointed, qualified and acting guardian ad litem of Gerald Stintzi, a minor of the age of 17 years.

II.

The Northern Pacific Railway Company is a corporation engaged as a common rail carrier of freight and passenger traffic, conducts such business in Spokane County, Washington, and maintains and operates its railway yard and yard office at Yardley, Spokane County, Washington.

III.

Addison Miller Company is a corporation engaged in business as a *fail* supplier, and under contract with the defendant, Northern Pacific Railway Company, performs car icing operations for said railway at its yard at Yardley, Washington. At all times herein mentioned, the minor, Gerald Stintzi, was employed by the Addison Miller Company as a laborer and was engaged in such car icing operations.

IV.

During the evening of July 17, 1952, the minor, Gerald Stintzi, was engaged in the performance of duties for his employer, Addison Miller Company, and with other employees of such company was icing cars of the defendant, Northern Pacific Railway Company, which cars had been spotted by the defendant for such purpose alongside the defendant's [6] icing dock at Yardley, Washington. At the same time other railway cars and engines of the defendant railway company were engaged in switching operations at the defendant's yard under the control of employees of the defendant who knew or should have known that the cars immediately adjacent to the loading dock were being iced and that

employees of Addison Miller Company would be engaged in icing operations around and about the defendant's cars which had been spotted beside the icing dock. On July 17, 1952, at approximately 8:20 p.m., the minor, Gerald Stintzi, while engaged in such icing operations, was standing immediately alongside and partially between car No. 77346 and car No. 56160 owned by the defendant, which cars in a line of similar cars had been placed by the defendant alongside the icing dock for the purpose of being iced. As the minor plaintiff was standing in such position, the defendant, through its employees then engaged in switching operation, negligently and without warning of intention so to do disengaged a number of freight cars which were being switched, allowing the same to drift down the track and to come into violent contact with the stationary cars beside the icing dock which were in the process of being iced. As a result, the minor plaintiff was caught partially between cars No. 77346 and 56160 and was dragged along defendant's track for a distance of 42 yards, sustaining serious and permanent injuries to his person.

V.

As a proximate result of defendant's negligence, the minor plaintiff sustained a crushing and mangling of his right leg requiring amputation of the same at the hip, a fracture of the left leg, a fracture of the right arm, a severe laceration of the scrotum, a rupture of the urethra, various bruises, abrasions and contusions about the head and body, and a severe shock to his nervous system. At the

time of said injuries the minor plaintiff was of the age of 17 years, in good health and physical condition. Said injuries are permanent, and as a result the minor plaintiff will be totally disabled and incapable of engaging in any gainful occupation for the [7] balance of his natural life. By reason of such injuries and the pain and suffering occasioned and to be endured in the future thereby and by reason of the minor plaintiff's future inability to engage in any gainful occupation, plaintiff has been damaged in the sum of $150,000.00.

VI.

Since the date of such injury, the minor plaintiff has been under medical care and attention at the Sacred Heart Hospital, where he will be required to remain for an indefinite period in the future. Although plaintiff does not now know the exact extent and cost of future medical and hospital care and attention which will be required by said minor, she is informed and alleges that such will approximate $10,000.00, all to plaintiff's further damage in that amount.

Wherefore, plaintiff prays for judgment against the defendant in the sum of $160,000.00, together with her costs and disbursements herein.

KEITH, WINSTON, MacGILLIVRAY & REPSOLD,
JOHN T. DAY,
Attorneys for Plaintiff

Duly Verified. [8]
[Endorsed]: Filed August 29, 1952.

[Title of District Court and Cause.]

BOND FOR REMOVAL

Know All Men by These Presents: That we, Northern Pacific Railway Company, a corporation, as Principal, and The Fidelity and Casualty Company of New York, a corporation of the State of New York, as Surety, are held and firmly bound unto Clara Stintzi, Guardian Ad Litem for Gerald Stintzi, a Minor, Plaintiff in the above entitled action, in the penal sum of One Thousand and no/100ths Dollars ($1,000.00), lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our respective successors and assigns, jointly and severally, firmly by these presents.

Upon Condition, Nevertheless, That

Whereas, the said Northern Pacific Railway Company, Defendant herein, has petitioned the District Court of the United States for the Eastern District of Washington, Northern Division, for the removal of the above entitled cause from the Superior Court of the State of Washington in and for Spokane County, to the United States District Court for the Eastern District of Washington, Northern Division.

Now, if the said Northern Pacific Railway Company shall well and truly pay all costs and disbursements that may be awarded by said United States District Court, if said Court shall hold that this suit is wrongfully or improperly removed thereto,

then this obligation to be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,
/s/ By F. J. McKEVITT,
Division Counsel

[Seal] THE FIDELITY AND CASUALTY OF NEW YORK,
/s/ By J. E. McGOVERN, Attorney [9]

[Endorsed]: Filed D. C. August 29, 1952.

[Title of District Court and Cause.]

NOTICE OF FILING PETITION AND BOND FOR REMOVAL

To Clara Stintzi, Guardian ad Litem for Gerald Stintzi, a minor, and to Keith, Winston, MacGillivray & Repsold and John T. Day, your attorneys:

You are hereby notified that on the 29 day of August, 1952, a Petition and Bond for removal of the above entitled cause, copies of which are hereto attached, were filed in the United States District Court for the Eastern District of Washington, Northern Division, at Spokane, Washington.

Dated at Spokane, Washington, this 29 day of August, 1952.

CASHATT & TURNER,
/s/ By LEO N. CASHATT,
Attorneys for Defendant

CANNON, McKEVITT & FRASER,
/s/ By FRANK J. McKEVITT,
Attorneys for Defendant

Acknowledgment of Service attached. [10]

[Endorsed]: Filed D. C. August 30, 1952.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Plaintiff for her Amended Complaint in the above-entitled action alleges:

I.

That plaintiff, Clara Stintzi, is the mother and the legally and duly appointed, qualified and acting Guardian ad Litem of Gerald Stintzi, a minor of the age of 18 years, and who was of the age of 17 years at the time of the accident hereinafter described.

II.

That defendant, Northern Pacific Railway Company, now is and at all times herein mentioned has been a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, and as such operates lines of railroad in the State of Minnesota and other states and in the State of Washington, and in Spokane County, and is a common rail carrier, hauling freight and passengers on its lines as a common carrier for hire, and said defendant maintains and operates a railroad yard

and yard shops at Yardley, near the City of Spokane, in Spokane County, Washington. [16]

III.

The Addison Miller Company is a corporation engaged in business in Spokane County and at or near Yardley, Washington, and under and by virtue of a contract with the defendant, Northern Pacific Railway Company, Addison Miller Company performs car icing operations for the said defendant railroad at its said yard at Yardley, Washington; and at all times herein mentioned the minor, Gerald Stintzi, was employed by the Addison Miller Company as a laborer, and was at the time of the accident herein alleged, engaged in car icing operations under the direction of the Addison Miller Company.

IV.

That on or about the evening of July 17th, 1952, and for many years previous thereto, the defendant had maintained certain railroad yards, including various repair tracks, inspection tracks and the usual trackage which is common in railroad yards generally; that on or about the evening of July 17th, 1952, the said minor, Gerald Stintzi, was engaged in the performance of duties for his employer, the Addison Miller Company, and he was working within the scope and course of his employment and within the line of his duty along with other employees of said company in icing cars for defendant, Northern Pacific Railway Company, which cars had been spotted by the defendant for

such purposes alongside the defendant's icing dock at Yardley, Washington; that at said time it was the duty of the said minor, Gerald Stintzi, to work and be on, around and about the said railroad cars and trains of the defendant; and at said time other railroad cars and engines of the defendant railroad company were engaged in switching operations at and throughout the defendant's yard and under the control of the defendant and its employees and agents, who knew or should have known that the cars which were immediately adjacent to its loading dock were being iced and that employees of Addison Miller Company would be engaged in said icing operations in, around and about said defendant's cars [17] which had been spotted beside said icing dock.

V.

That on July 17th, 1952, at approximately 8:20 p.m., the minor, Gerald Stintzi, while engaged in such icing operations and within the scope of his employment, was required to stand and was standing immediately alongside and partially between car Nos. 77346 and car No. 56160 of the defendant railway company, which two cars had been placed in a line of cars by the defendant alongside of the icing dock; at such time and as the minor was standing in the position heretofore described, the defendant and its agents and employees were then engaged in switching operations and negligently and carelessly and without warning of any intention so to do, disengaged and uncoupled a number of freight cars which were being switched, allowing the same

to drift and proceed down said track and to come into sudden and violent contact with the stationary cars spotted beside said loading docks; that as a result the stationary cars were caused to be set in motion and they moved onto and against cars No. 77346 and No. 56160 where the said Gerald Stintzi was working, causing said cars to be suddenly and violently moved and causing the said Gerald Stintzi to be thrown under the moving wheels thereof, dragging him along said track for a considerable distance and inflicting upon him the severe and permanent injuries hereinafter set forth.

VI.

That said minor's injuries and damages were directly and proximately caused by the negligence of the defendant, its agents, employees and servants, in one or more of the following respects:

1. That the defendant, its agents and servants negligently failed to keep a proper lookout and to use proper care for the safety of said Gerald Stintzi while he was in the performance of his duty; [18]

2. That the defendant, its agents and servants negligently failed to give to said Gerald Stintzi, any notice or warning that any railway cars were to be moved and shoved onto and against the railway cars about which the said Gerald Stintzi was working;

3. That the defendant, its agents and servants negligently moved and switched railway cars onto, over and against the said line of cars about which said Gerald Stintzi was working;

4. That the defendant, its agents and servants

in charge of its switching operations, negligently moved, operated and controlled said switching operations and the cars involved therein;

5. That the defendant, its agents and servants in charge of said switching operations which resulted in said cars being switched against those being iced and on which the said Gerald Stintzi was working, negligently moved said engine and said train and said cars involved at an excessive and dangerous rate of speed under the circumstances obtaining;

6. That at all times herein mentioned, the defendant, its agents, servants and employees, had full knowledge and notice, or in the exercise of ordinary care should have had full notice and knowledge, that the said Gerald Stintzi and/or other employees of defendant or other persons employed by other parties and by Addison Miller Company would be working on or about said railway cars spotted beside the defendant's loading dock, but that notwithstanding its said knowledge and notice, the defendant, its agents, employees and servants negligently caused the said cars to be switched, moved or pushed onto and against the said stationary cars spotted and standing on the track adjacent to the defendant's loading dock and where said Addison Miller Company was carrying on its icing operations, without notice or warning of any kind;

7. That the defendant, its agents, employees and servants in charge of said train and cars which were switched negligently, moved the same without keeping the same under reasonable and proper control at all times.

VII.

That by reason of defendant's negligence in one or more of the particulars above charged, and as a proximate result of said defendant's negligence as aforesaid, the said Gerald Stintzi was severely injured in and about his entire body; that the right leg of said Gerald Stintzi was crushed and mangled and traumatically amputated near the hip joint; that the skin of the right lower abdomen and buttocks was torn away from the underlying tissues [19] and extensive lacerating wounds were suffered by said Gerald Stintzi which wounds extended into the rectum; and there was a complete avulsion of the right scrotum and a rapture of the urethra; that the left femur was fractured in a comminuted manner at the junction of its middle and upper third, and the said Gerald Stintzi also suffered multiple contusions about the knee and hip joint on the left hand side and said Gerald Stintzi also sustained comminuted fractures of both bones of the right forearm at about the mid point of the lower arm; that said injuries are permanent and as a result thereof the said minor, Gerald Stintzi, will be totally disabled and incapable of engaging in gainful occupation for the balance of his life.

VIII.

That the said Gerald Stintzi sustained a severe shock unto his entire nervous system and his general health and wellbeing has been greatly injured and impaired and all of said injuries have caused the said Gerald Stintzi great pain and suffering, al-

though while at the time of said injuries said minor Gerald Stintzi was of the age of 17 years and in good health and physical condition; that said minor sustained great and extreme pain and suffering; that the treatment of said Gerald Stintzi required numerous transfusions, a guillotine re-amputation of the right femur approximately three inches below the hip joint, with removal of devitalized skin and said Gerald Stintzi likewise sustained extreme suffering by the replacement of the right testicle in the scrotum and throughout the whole treatment and repair of the said Gerald Stintzi; that the said Gerald Stintzi was required to submit to surgery numerous times, at which times treatment was accorded to the said Gerald Stintzi and surgical procedures were engaged in, and there were skin grafts performed which caused great and additional pain and suffering. That surgery was performed on the right forearm of the said Gerald Stintzi and he remained under treatment at a hospital [20] for a period of time in excess of nine months; and said Gerald Stintzi, as a result of his injuries, has been unable to use an artificial limb and he will always suffer from disfigurement, humiliation and embarrassment resulting from his said injuries, and said Gerald Stintzi will require a considerable amount of constant care for many years.

IX.

That the said Gerald Stintzi, as a result of the injuries sustained, has incurred hospital expenses in the present amount of $6,683.05, doctors' bills in

the present amount of over $3,000.00, expense for prosthetic devices in the amount of $662.81, expense for car and transportation in a sum in excess of $500.00, and other incidental items of expense, the full amounts of which are not known; that likewise, by reason of the injuries and suffering occasioned and to be endured in the future, and by reason of the minor plaintiff's future inability to engage in gainful occupation, and by reason of the necessity for future personal care, and by reason of all of the injuries sustained, and the humiliation and mortification heretofore alleged, the said minor plaintiff, Gerald Stintzi, has been damaged in the sum of $250,000.00.

Wherefore, plaintiff prays for judgment against the defendant as follows:

1. For the sum of $260,845.86;
2. For costs and disbursements; and
3. For such other special damages by way of hospital, medical care and personal care, and other expenses which may be incurred and [21] ascertainable at the time of trial.

/s/ R. MAX ETTER,
/s/ JOHN D. MacGILLIVRAY,
/s/ JOHN T. DAY,
Attorneys for Plaintiff.

Jury trial of the above issues is hereby demanded.

/s/ R. MAX ETTER,
of Counsel for Plaintiff. [22]

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant, and for answer to plaintiff's Amended Complaint, admits, denies and alleges as follows:

I.

Answering Paragraph I, defendant admits that Clara Stintzi is the Mother and duly appointed, qualified and acting Guardian ad Litem of Gerald Stintzi. As to the age of the minor therein referred to, defendant has no knowledge or information sufficient to form a belief thereof, and therefore denies the same.

II.

Defendant admits Paragraph II.

III.

Answering Paragraph III, defendant admits each and every matter therein contained, except that defendant specifically denies that at the time of the accident, Gerald Stintzi was engaged in car icing operations.

IV.

Answering Paragraph IV, defendant admits that on or about the evening of July 17, 1952, and for many years previous thereto, the defendant had maintained certain railroad yards, including [26] various repair tracks, inspection tracks and the usual trackage which is common in railroad yards generally; that on or about the evening of July 17,

1952, the said minor Gerald Stintzi was engaged in the performance of duties for his employer Addison-Miller Company, and at said time defendant railway company was engaged in switching operations in its yard. Save and except as herein specifically admitted, the defendant denies each and every other matter and thing in said paragraph contained whether as therein alleged or otherwise.

V.

Answering Paragraph V, defendant admits that on July 17, 1952, at approximately 8:20 p.m., Gerald Stintzi was involved in an accident and received severe and permanent injuries. Defendant denies each and every other matter or thing therein contained.

VI.

Defendant denies Paragraph VI.

VII.

Answering Paragraph VII, defendant admits that Gerald Stintzi was severely injured, but specifically denies that the said injuries were the proximate result of defendant's negligence, and denies each and every other matter or thing therein contained.

VIII.

Answering Paragraph VIII, defendant admits that Gerald Stintzi received severe injuries, but denies each and every allegation, matter or thing contained in said paragraph, as defendant does not

have sufficient knowledge or information upon which to form a belief.

IX.

Answering Paragraph IX, defendant admits that following the injuries to said minor, he was hospitalized and received medical care. Defendant specifically denies that, as a result of any negligent act on its part, its servants, agents or employees, [27] plaintiff incurred hospital and doctor bills and expense for prosthetic devices, and expense for car and transportation and other incidental items of expense, in the amount of $10,845.86 or in any amount, and will incur future medical expense and has been damaged in the sum of $250,000.00, or in any amount whatsoever.

For further answer and first affirmative defense, defendant alleges that if the minor Gerald Stintzi received any injuries, the same were the result of his own negligence, materially and proximately contributing thereto.

For further answer and second affirmative defense, defendant alleges that if said injuries received by the minor Gerald Stintzi were not the result of his own negligence, materially and proximately contributing thereto, that said injuries were the proximate result of the negligence of the said minor's employer Addison-Miller, Inc., its servants, agents or employees.

For further answer and third affirmative defense, defendant alleges:

That at all times subsequent to July 18, 1936, defendant Northern Pacific Railway Company

owned the land and plant referred to in the Amended Complaint herein, which plant was operated by Addison-Miller, Inc., the employer of plaintiff herein. That at all times subsequent to July 18, 1936, Addison-Miller, Inc. has been operating said plant pursuant to a contract entered into between defendant and Addison-Miller, Inc. on said 18th day of July 1936, and said contract has at all times since said date been in full force and effect. In said contract, Addison-Miller, Inc. is referred to as the "Contractor," and said contract, among other things, provides: [28]

> "The Contractor shall at all times, at its own cost and expense, comply with all requirements of the Workmen's Compensation Act of the State of Washington, and hereby agrees to indemnify and save the Railway Company harmless from all claims and causes of action by employees of the parties hereto or third persons, on account of personal injuries, death or damage to property in any manner caused by, arising from, or growing out of the maintenance or operation of the said ice plant, or handling of ice under this contract."

That plaintiff Gerald Stintzi entered into the employment of Addison-Miller, Inc. while the aforesaid contract was in full force and effect and long after its execution. That plaintiff's said employer Addison-Miller, Inc. has at all times mentioned in the Complaint complied with the requirements of the Workmen's Compensation Act of the State of Washington and paid when due all amounts required

under the said compensation act as to the employment of plaintiff, and plaintiff was, at the time of his injury, July 17, 1952, covered under the terms of said Workmen's Compensation Act and entitled to the benefits provided by said act, and that Addison-Miller, Inc. was and is likewise entitled to the benefits of the said Workmen's Compensation Act as to plaintiff's said injury.

That, immediately following the occurrence of plaintiff's said injury, and within the time required by the said Workmen's Compensation Act, plaintiff's said employer Addison-Miller, Inc. filed notice of said injury with the State of Washington with the Supervisor of Industrial Insurance, as required by the terms of said Act.

Wherefore, this defendant, having fully answered plaintiff's Amended Complaint, prays that the same be dismissed, that the plaintiff take nothing thereby, and that this defendant have its costs and disbursements herein incurred.

CANNON, McKEVITT & FRASER
/s/ By F. J. McKEVITT,

CASHATT & WILLIAMS
/s/ By LEO N. CASHATT,
Attorneys for the Defendant. [29]

Duly Verified. [30]

Acknowledgment of Service attached.

[Endorsed]: Filed May 3, 1954.

[Title of District Court and Cause.]

PLAINTIFF'S STATEMENT OF CONTENTIONS

Comes now the plaintiff Gerald Stintzi through his Guardian ad Litem Clara Stintzi and states that the following contentions will be made on his behalf on trial of the above action in the United States District Court on June 28, 1954:

First: Gerald Stintzi is a minor who was of the age of 17 years on July 17, 1952 and is represented by his mother Clara Stintzi, his acting Guardian ad Litem.

Second: The Northern Pacific Railway Company is a common rail carrier and on and prior to July 17, 1952, maintained and operated a railroad yard and yard shops at Yardley, Spokane County, Washington.

Third: The Addison-Miller Company is a corporation and on and prior to July 17, 1952, by virtue of a contract with the Northern Pacific Railway Company performed certain icing operations for the Northern Pacific at Yardley, Washington.

Fourth: On and prior to July 17, 1952, the minor plaintiff was employed by the Addison Miller Company and was engaged as a laborer in the performance of said car icing operations. That in the performance of his duties the minor plaintiff Gerald Stintzi was required to work and be on, around and about railroad cars of the defendant, which were from time to time left standing on trackage imme-

diately alongside the icing dock at Yardley, Washington, and particularly on and about cars which were from [37] time to time spotted and left standing on a railroad track known as track 13 located immediately to the north of said icing dock.

Fifth: On the evening of July 17, 1952, a number of railroad cars had been spotted and left standing extending in an easterly and westerly direction on said track 13 immediately adjacent and to the north of defendant's icing dock at Yardley, Washington. On said evening the minor plaintiff Gerald Stintzi, pursuant to instructions given to him by the foreman of Addison Miller Company, was assisting in cleaning out slush ice accumulated in the slush pit within defendant's icing dock, which slush ice, pursuant to instructions, was being emptied or dumped in a ditch or depression immediately to the north of said track 13 and to the north of said railroad cars spotted and left standing on said track 13.

Sixth: While in the performance of said duties and at proximately 8:20 p.m. and July 17, 1952, the minor plaintiff Gerald Stintzi was required to stand and was standing alongside and partially between two cars of the defendant railway company which were in the line of cars previously spotted and left standing on track 13 immediately to the north of the defendant's icing dock. The defendant negligently and without any warning of its intention so to do, disengaged and uncoupled a number of freight cars at a point some distance to the west of defendant's icing dock and allowed said cars to

drift and proceed down track 13 and to come into sudden and violent contact with the stationary cars spotted immediately beside defendant's icing dock. As a result, the stationary cars spotted and left standing on track 13, including the two cars alongside and between which the minor plaintiff Gerald Stintzi was working, were caused to be set in motion, throwing the minor plaintiff under the moving wheels thereof, dragging him along track 13 and inflicting severe injuries upon him.

Seventh: The minor plaintiff's injuries and damages were proximately caused by the negligence of the defendant, its agencies, employees and servants in one or more of the following repects:

1. That the defendant, its agents and servants negligently failed to keep a proper lookout and to use proper care for the safety of said Gerald Stintzi while he was in the performance [38] of his duty;

2. That the defendant, its agents and servants negligently failed to give to said Gerald Stintzi, any notice or warning that any railway cars were to be moved and shoved onto and against the railway cars about which the said Gerald Stintzi was working;

3. The the defendant, its agents and servants negligently moved and switched railway cars onto, over and against the said line of cars about which said Gerald Stintzi was working;

4. That the defendant, its agents and servants in charge of its switching operations, negligently moved, operated and controlled said switching operations and the cars involved therein;

5. That the defendant, its agents and servants in charge of said switching operations which resulted in said cars being switched against those being iced and on which the said Gerald Stintzi was working, negligently moved said engine and said train and said cars involved at an excessive and dangerous rate of speed under the circumstances obtaining;

6. That at all times herein mentioned, the defendant, its agents, servants and employees, had full knowledge and notice, or in the exercise of ordinary care should have had full notice and knowledge, that the said Gerald Stintzi and/or other employees of defendant or other persons employed by other parties and by Addison Miller Company would be working on or about said railway cars spotted beside the defendant's loading dock, but that notwithstanding its said knowledge and notice, the defendants, its agents, employees and servants negligently caused the said cars to be switched, moved or pushed onto and against the said stationary cars spotted and standing on the track adjacent to the defendant's loading dock and where said Addison Miller Company was carrying on its icing operations, without notice or warning of any kind;

7. That the defendant, its agents, employees and servants in charge of said train and cars were switched negligently, moved the same without keeping the same under reasonable and proper control at all times.

Eighth: That by reason of defendant's negli-

gence in one or more of the particulars above charged, and as a proximate result of said defendant's negligence as aforesaid, the said Gerald Stintzi was severely injured in and about his entire body; that the right leg of said Gerald Stintzi was crushed and mangled and traumatically amputated near the hip joint; that the skin of the right lower abdomen and buttocks was torn away from the underlying tissues and extensive lacerating wounds were suffered by said Gerald Stintzi which wounds extended into the rectum; and there was a complete avulsion of the right scrotum and a rupture of the urethra; that the left femur was fractured in a comminuted manner at the junction of its middle and upper third, [39] and the said Gerald Stintzi also suffered multiple contusions about the knee and hip joint on the left hand side and said Gerald Stintzi also sustained comminuted fractures of both bones of the right forearm at about the mid point of the lower arm; that said injuries are permanent and as a result thereof the said minor, Gerald Stintzi, will be totally disabled and incapable of engaging in gainful occupation for the balance of his life.

Ninth: That the said Gerald Stintzi sustained a severe shock unto his entire nervous system and his general health and wellbeing has been greatly injured and impaired and all of said injuries have caused the said Gerald Stintzi great pain and suffering, although while at the time of said injuries said minor Gerald Stintzi was of the age of 17

years and in good health and physical condition; that said minor sustained great and extreme pain and suffering; that the treatment of said Gerald Stintzi required numerous transfusions, a guillotine re-amputation of the right femur approximately three inches below the hip point, with removal of devitalized skin and said Gerald Stintzi likewise sustained extreme suffering by the replacement of the right testicle in the scrotum and throughout the whole treatment and repair of the said Gerald Stintzi; that the said Gerald Stintzi was required to submit to surgery numerous times, at which times treatment was accorded to the said Gerald Stintzi and surgical procedures were engaged in, and there were skin grafts performed which caused great and additional pain and suffering. That surgery was performed on the right forearm of the said Gerald Stintzi and he remained under treatment at a hospital for a period of time in excess of nine months; and said Gerald Stintzi, as a result of his injuries, has been unable to use an artificial limb and he will always suffer from disfigurement, humiliation and embarrassment resulting from his said injuries, and said Gerald Stintzi will require a considerable amount of constant care for many years.

Tenth: That the said Gerald Stintzi, as a result of the injuries sustained, has incurred hospital expenses in the present amount of $6,683.05, doctors' bills in the present amount of over $3,000.00, expense for prosthetic devices in the amount of $662.81, expense for car and transportation [40] in

a sum in excess of $500.00, and other incidental items of expense, the full amounts of which are not known; that likewise, by reason of the injuries and suffering occasioned and to be endured in the future, and by reason of the minor plaintiff's future inability to engage in gainful occupation, and by reason of the necessity for future personal care, and by reason of all of the injuries sustained, and the humiliation and mortification heretofore alleged, the said minor plaintiff, Gerald Stintzi, has been damaged in the sum of $250,000.00.

/s/ JOHN D. MacGILLIVRAY
/s/ R. MAX ETTER
/s/ JOHN T. DAY

Acknowledgment of Service attached. [41]

[Endorsed]: Filed June 21, 1954.

[Title of District Court and Cause.]

DEFENDANT'S STATEMENT OF CONTENTIONS

Comes now the defendant and submits the following as its statement of the contentions that will be made on its behalf on the trial of the above cause:

I.

That the duties of the plaintiff Gerald Stintzi, in connection with his employment by Addison-Miller Company, did not require him to work and

be on, around or about railroad cars of the defendant except the top of such refrigerator cars as were from time to time being iced by Addison-Miller Company, and the said Gerald Stintzi had no right to be elsewhere on, around or about railroad cars of the defendant in defendant's railroad yard at Yardley, Washington, and particularly had no right to be between or under any cars, refrigerator or otherwise, nor any right to be on any of the defendant's trackage.

II.

That the defendant Gerald Stintzi was not at the time of his injury engaged in icing operations, and particularly not engaged in icing operations as that term is employed in the contract between defendant and Addison-Miller Co. referred to and alleged [43] in Paragraph III of plaintiff's Amended Complaint.

III.

That neither defendant nor any of its agents or employees had any knowledge prior to the injury of Gerald Stintzi that he was about any of the cars in defendant's yard at Yardley, Washington, and particularly no knowledge that the said Gerald Stintzi was on defendant's trackage and between two of such cars.

IV.

That if the said Gerald Stintzi had any right to be standing on defendant's trackage and between cars on such trackage, neither the defendant nor its agents or employees was guilty of any of the acts of negligence charged by plaintiff, nor of any

negligence whatsoever which was a proximate cause of plaintiff's injuries.

V.

That the plaintiff Gerald Stintzi was himself guilty of negligence which proximately contributed to his injury and assumed the risk in these respects:

(a) That he voluntarily placed himself on defendant's trackage and between two of the cars on said trackage at a time when he knew or should have known that said cars were liable to be moved by defendant, and that he was exposing himself to great danger.

(b) That the said Gerald Stintzi voluntarily entered a place of great danger between two of the cars standing on defendant's trackage in its yards without making any effort whatsoever before doing so to determine whether or not there was any likelihood that such cars might be moved by defendant.

CANNON, McKEVITT & FRASER
/s/ By F. J. McKEVITT

CASHATT & WILLIAMS
/s/ By LEO N. CASHATT
Attorneys for the Defendant.

Acknowledgment of Service attached. [44]

[Endorsed]: Filed June 28, 1954.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS

* * * * *

Requested Instruction No. 3

If you find under the other instructions that I have given you that Gerald Stintzi was an invitee at the place of his injury and that Northern Pacific Railway Company was guilty of negligence which was a proximate cause of his injury, then you should proceed to determine whether or not Gerald Stintzi was himself guilty of negligence which proximately contributed to his injury. In this connection, you are instructed that contributory negligence of a plaintiff when established is a complete defense to an action of this type. No matter how negligent the defendant Northern Pacific Railway Company may have been, if Gerald Stintzi was himself guilty of some negligence which proximately and materially contributed to the occurrence of the injury, he cannot recover. The burden of proving contributory negligence is upon the defendant.

A person is guilty of contributory negligence if he fails to exercise the care which an ordinarily prudent person would use under the same or similar circumstances and his failure proximately and materially contributes to the occurrence of his injury. Ordinary prudence or reasonable care requires that

a person in possession of his faculties exercise reasonable and ordinary care for his own safety. One may not cast the burden of his own protection upon another, but at all times owes himself the duty of self-protection. The law will not permit one to close his eyes to danger and if thereby injured seek a remedy in damages against another. One is at all times bound to use his intellect, senses and faculties for his own protection.

You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous [1070] method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger.

Therefore, if you should find from a preponderance of the evidence that Gerald Stintz, in going between the freight cars in question and beneath the couplings, failed to exercise reasonable care for his own protection, and that such failure proximately contributed to his injury, then Gerald Stintzi was guilty of contributory negligence and cannot recover in this action, and your verdict should be for defendant, notwithstanding that you may also find that the defendant was guilty of negligence. On the other hand, if you should find that Gerald Stintzi was an invitee and that the defendant was guilty of negligence which was a proximate cause of his injury and you should further find that Gerald

Stintzi was not contributorily negligent, your verdict should be for the plaintiff. [1071]

* * * * *

Requested Instruction No. 5

You are instructed that any negligence on the part of Addison Miller Company, or on the part of its foreman, in directing plaintiff to cross the track in question or in failing to take precautions to protect plaintiff while he was so doing, cannot be considered by you as negligence on the part of Northern Pacific Railway Company. The defendant in this case, Northern Pacific Railway Company, is in no way chargeable with or responsible for any negligence on the part of Addison Miller Company or its foreman which may have caused or contributed to plaintiff's injury. If you should find that the sole cause of plaintiff's injury was negligence on the part of Addison Miller Company or its foreman, or that the sole cause of plaintiff's injury was the concurrent negligence of plaintiff himself and Addison Miller Company or its foreman, then your verdict must be in favor of the defendant. [1073]

[Endorsed]: Filed July 1, 1954.

* * * * *

Requested Instruction No. 6

Aside from all other instructions that I have given you, you are instructed that if you should find from a preponderance of the evidence that there were no cars being iced on track 13, nor any car or cars on track 13 from which salt was being

unloaded by Addison Miller employees during the time that Gerald Stintzi was crossing track 13 between and underneath the couplings of the freight cars, your verdict must be for the defendant. [1074]

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the Above Entitled Cause, find for the plaintiff, and assess damages in the sum of $148,500.00.

/s/ GEORGE WEIFORD,
Foreman [1088]

[Endorsed]: Filed July 3, 1954.

In the District Court of the United States, Eastern District of Washington, Northern Division

No. 1052

CLARA STINTZI, Guardian Ad Litem of Gerald Stintzi, a minor, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Defendant.

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver, presiding, with all parties appearing by counsel and the issues

having been duly tried, and the jury, on the 3rd day of July, 1954, having rendered a verdict for the plaintiff to recover of the defendant damages in the amount of $148,500.00 (One Hundred Forty Eight Thousand Five Hundred Dollars);

It Is Ordered and Adjudged that the plaintiff recover of the defendant the sum of $148,500.00 (One Hundred Forty Eight Thousand Five Hundred Dollars) and his costs of action.

Dated at Spokane, Washington, this 3rd day of July, 1954.

/s/ STANLEY D. TAYLOR,
Clerk [1089]

[Endorsed]: Filed July 3, 1954.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND JUDGMENT ENTERED THEREON AND FOR JUDGMENT IN ACCORDANCE WITH DEFENDANT'S PRIOR MOTIONS FOR A DIRECTED VERDICT; AND ALTERNATIVE MOTION FOR A NEW TRIAL.

Comes now the defendant and moves the Court to set aside the verdict the jury returned in this cause on the 3rd day of July, 1954, and the judgment in favor of the plaintiff entered on said verdict on the 3rd day of July, 1954, and further moves

the Court to have judgment entered in favor of defendant in this cause in accordance with the defendant's motion for a directed verdict made at the close of plaintiff's evidence and defendant's motion for a directed verdict made at the close of all of the evidence. This motion is made upon the same grounds as were stated in support of said motions for a directed verdict, that is, (1) that as a matter of law plaintiff Gerald Stintzi was not an invitee on defendant's premises at the time and place of his injury; (2) that even if Gerald Stintzi was an invitee, there was no evidence or reasonable inference from evidence that defendant was guilty of any negligence which was a proximate cause of injury to Gerald Stintzi; and (3) that Gerald Stintzi was guilty of contributory negligence as a matter of law.

This motion is made pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure. [1090]

In the event the foregoing motion is denied, and not otherwise, then the defendant moves the Court for a new trial upon the following grounds which materially prejudiced the substantial rights of defendant on the trial of this action:

I.

Irregularity in the proceedings of the Court, jury, or adverse party, or any order of the Court or abuse of discretion by which the defendant was prevented from having a fair trial.

II.

Misconduct of the prevailing party, his attorneys or the jury.

III.

Accident or surprise which ordinary prudence could not have guarded against.

IV.

Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice.

V.

Insufficiency of the evidence to justify the verdict or decision.

VI.

Errors in law occurring at trial and excepted to by defendant.

Defendant's motion alleging insufficiency of the evidence to justify the verdict or decision or judgment is based upon the following grounds, to-wit:

(a) The testimony of witnesses both for the plaintiff and the defendant proved, as a matter of law, that the minor Gerald Stintzi, at the time and place where his injuries were sustained, was a trespasser, in that his injuries occurred on property owned by the defendant Northern Pacific Railway Company. The work in which he was engaged was not the icing of cars of the defendant, [1091] the unloading of salt cars of the defendant, nor was such work in anywise icing operations within the meaning of the contract between Addison Miller, Inc. and the Northern Pacific Railway Company, Inc.; the said Gerald Stintzi was not upon the property of the said defendant at the time of his injuries by invitation, either express or implied; there was no evi-

dence of probative value that the Northern Pacific Railway Company had ever given permission to the Addison Miller Company to dump slush ice north of track 13; the testimony of Gerald Stintzi himself was to the effect that during the whole course of his employment with Addison Miller Company in 1951 and 1952, he had never dumped slush ice north of track 13; to the same effect was the testimony of his co-employees; there was an utter absence of evidence of any kind or character that in the performance of any duty for Addison Miller Company, its employees had crossed track 13 for any purpose by climbing over cars, between cars, or under the couplings of cars of the defendant railway company; the evidence conclusively showed that for a long period of time, and by agreement between Addison Miller Company and the defendant railway company, it was the duty of Addison Miller Company, when engaged in icing operations of any kind or character, to place a blue light on the top of its icing dock, which would serve as a warning to Northern Pacific employees that track 13 was being used for the purposes contemplated by the agreement between said Addison Miller Company and the Northern Pacific Railway Company; the uncontradicted evidence was that at the time of his injuries, no blue light was present; the evidence conclusively shows that at the time of his injuries, Gerald Stintzi was not working on, in, around or under any car of the Northern Pacific Railway Company which was in anywise being used for icing operations; the evidence conclusively shows that the employees of

the Northern Pacific Railway Company had no knowledge, actual or constructive, of the presence of Gerald Stintzi at the place where [1092] he was injured, or any reason to anticipate that any employee of Addison Miller Company would be engaged in the dumping of slush ice across track 13 in any manner whatsoever, and particularly by crawling under the couplers of its cars in order so to do; the evidence conclusively shows that Gerald Stintzi did not sustain his injuries as the result of any willful or wanton act on the part of said defendant; the evidence conclusively shows that the said Gerald Stintzi was guilty of contributory negligence as a matter of law in that he knew, or should have known, that it was inherently dangerous to cross railroad tracks within switching yards, especially by crawling under the couplings of coupled cars; the evidence conclusively shows that even though said Gerald Stintzi was directed by his foreman to dump the slush ice north of track 13, he was not instructed by said foreman to pass between railroad cars, or under or over the couplings of coupled cars; the evidence conclusively shows that the area on which the accident occurred was not covered by the contract between the Addison Miller Company and the Northern Pacific Railway Company; the evidence conclusively shows that the switching movement out of which Gerald Stintzi's injuries arose, was common and standard practice in the switching yards of the major railroads of the United States; the evidence conclusively shows that there were other areas immediately adjacent

to the door leading from the slush pit area where the slush ice could have been dumped without crossing track 13; there was sustantial and credible evidence that the foreman of Addison Miller Company, observing Gerald Stintzi and his companion passing between these cars, had warned them to desist from so doing, and advised them of the danger of so doing.

The errors in law occurring at the trial were the following:

1. The Court erred in admitting in evidence, over the objection of defendant, testimony concerning a portion of Rule 805 of [1093] the Consolidated Code of Operating Rules, and in admitting said portion of Rule 805 in evidence as Exhibit No. 47, which said portion of Rule 805 reads as follows:

"Before moving cars or engines in a street or on a station or yard track, it must be known that they can be moved with safety. Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone."

No rule violation was pleaded in the amended complaint, nor was any rule violation set forth in plaintiff's statement of the issues and contentions. Furthermore, an examination of this rule clearly indicates that it was not enacted for the benefit of a third person engaged in the type of work that Gerald Stintzi was performing prior to and at the time of his injuries.

2. The Court erred in admitting in evidence, over

defendant's objection, testimony concerning the blue flag rule found in the Consolidated Code of Operating Rules, for the reason and upon the grounds that said rule had no application to a person engaged in the type of work Gerald Stintzi was performing at the time of his injuries, and furthermore that said rule was one enacted for the protection of employees of the defendant, and not employees of third parties.

3. The Court erred in admitting in evidence over defendant's objection testimony to the effect that following the injuries sustained by Gerald Stintzi new and different safety methods for the protection of Addison Miller Company's employees were put into effect, for the reason that such evidence was wholly incompetent and immaterial and did not tend to prove or disprove any issue in the case and was highly prejudicial to defendant.

4. The Court erred in admitting in evidence over objection of defendant testimony of the presence of a salt car on track 13 for the reason and upon the grounds that even assuming the presence of such a car, there was an utter absence of evidence that Gerald [1094] Stintzi was on, in, or between said car or that he was in anywise engaged in the unloading of salt.

5. The Court erred in admitting in evidence over defendant's objection testimony with reference to the loud speaker system in defendant's yards, for the reason and upon the ground that there was no evidence that prior to the date of Gerald Stintzi's injuries this loud speaker had ever been used to

warn employees of Addison Miller Company of contemplated switching operations.

6. The Court erred in admitting in evidence plaintiff's exhibits 26 to 33, both inclusive, and the manner and method in which these pictures were exhibited to the jury in an open, darkened Court room, by means of having them projected against a beaded screen 40 inches by 40 inches, by the use of a projector which enlarged said pictures twenty to twenty-one times their normal size, and in permitting, over defendant's objection, a detailed explanation of each exhibit as it was thrown on the screen, by the witness, Dr. Valentine. The full nature and extent of Gerald Stintzi's injuries were gone into at great length by the witness, Dr. Valentine, prior to the showing of these pictures. The Courtroom exhibits of these pictures in the manner above described was cumulative testimony of a highly prejudicial character, and could serve no purpose other than to arouse the passion and prejudice of the jury, and to influence the amount of their verdict.

7. The Court erred in instructing the jury with reference to Rule 805 hereinabove referred to, for the reasons and upon the grounds heretofore stated.

8. The Court erred in instructing the jury that if the defendant had knowledge of or should have anticipated the presence of any Addison Miller employees "on or about the dock," it would be guilty of negligence if it did not exercise due care. This instruction was erroneous in that it permitted the jury to find the defendant liable if guilty of negligence, even if Gerald [1095] Stintzi was a trespas-

ser or licensee; furthermore, there was no evidence that Gerald Stintzi, at the time he was injured, was employed on or about the icing dock of Addison Miller Company.

9. The Court erred in instructing the jury that if they found that Addison Miller Company, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi in failing to provide a blue light for his protection on the icing dock, and that if the jury further found that the Northern Pacific Railway Company was also guilty of negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which contributed proximately in any measure to the injuries sustained by Gerald Stintzi, that the jury was instructed that the negligence of Addison Miller Company could not be imputed to Gerald Stintzi, and that he would not be liable for such employer's negligence, and that the jury should disregard any evidence of negligence of Gerald Stintzi's employer, and return its verdict for the plaintiff. This instruction was error because the jury was told that defendant would be liable if guilty of negligence "in any degree", which was the same as telling the jury that liability might be based on slight negligence, whereas the proper standard is ordinary negligence, or the failure to use ordinary care, assuming Stintzi was an invitee. This instruction was also erroneous wherein the jury was told that defendant was liable if its negligence "contributed proximately in any measure," whereas the law of proximate cause is that negligence must ma-

terially cause or contribute to cause the injury; defendant's objection being specifically directed in this connection to the words "in any measure." The overall effect of this instruction was to permit the jury to find in favor of the plaintiff, if they found that defendant was guilty of any negligence, however slight, and even though said negligence was not a proximate cause of plaintiff's injuries. [1096]

10. The Court erred in instructing the jury on concurring negligence of the defendant Northern Pacific Railway Company and Addison Miller Company for the reason and upon the grounds:

(a) There was no evidence of a substantial character that the defendant was guilty of actionable negligence.

(b) This instruction should have been qualified with a further statement that if Gerald Stintzi was a trespasser or licensee, he could not recover in any event.

11. The Court erred in refusing to give that portion of defendant's requested instruction No. 3, reading as follows:

"You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger."

The quoted language was a proper statement of the law particularly applicable to the issues of fact

of this case and not covered by any of the instructions given by the Court.

12. The Court erred in refusing to give defendant's requested Instruction No. 5, for the reason that this requested instruction was a proper statement of the law particularly applicable to the issues of fact in this case and was not covered in any of the other instructions given by the Court.

13. The Court erred in refusing to give defendant's requested instruction No. 6, for the reason that this requested instruction was a proper statement of the law particularly applicable to the issues of fact in this case and was not covered in any of the other instructions given by the Court.

14. The Court erred in refusing to give defendant's requested instruction No. 7, for the reason that this requested instruction was a proper statement of the law particularly applicable to the issues of fact in this case and was not covered in any [1097] of the other instructions given by the Court.

This motion is made upon all of the pleadings and papers on file herein, and upon the "minutes of the Court," and under the provisions of Rule 59 of the Federal Rules of Civil Procedure.

Dated this 12th day of July, 1954.

CANNON, McKEVITT & FRASER
/s/ By FRANK J. McKEVITT
CASHATT & WILLIAMS
/s/ By LEO N. CASHATT [1098]

Acknowledgment of Service attached.
[Endorsed]: Filed July 12, 1954.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE VERDICT AND JUDGMENT ENTERED THEREON AND FOR JUDGMENT IN ACCORDANCE WITH DEFENDANT'S PRIOR MOTIONS FOR A DIRECTED VERDICT; AND ALTERNATIVE MOTION FOR A NEW TRIAL.

On September 7th, 1954, pursuant to notice, the defendant's Motion to Set Aside Verdict and Judgment Entered Thereon and for Judgment in Accordance with defendant's Prior Motions for a Directed Verdict; and Alternative Motion for a New Trial, came on for hearing before the Court, the defendant being represented by Cashatt & Williams, and Cannon, McKevitt & Fraser, its attorneys; and the plaintiff being represented by R. Max Etter and John D. MacGillivray, her attorneys of record;

The defendant, by its attorneys, submitted a brief and memorandum of authority in support of its Motions and said Motions were duly argued to the Court by counsel for defendant and for plaintiff, and the Court thereupon advised counsel for the parties, plaintiff and defendant, that said Motions and the Court's determination thereon would be taken under advisement and for consideration;

Now, therefore, the Court having taken said Motions under advisement and having considered them, each and all, and having examined the files, records and notes of the proceeding, and having examined

and considered the brief and memorandum of defendant in support of its Motions, and having heard the argument of counsel for both parties, and having considered all of said argument, and all [1099] of the matters appertaining to said cause and having advised respective counsel by letter of September 28th, 1954, that said Motions would be denied;

Now, therefore, on the Motion of defendant to Set Aside Verdict and Judgment Entered Thereon and for Judgment in Accordance with Defendant's Prior Motions for a Directed Verdict; and Alternative Motion for a New Trial,

It is ordered that said Motions, and each of them, be denied.

Exception allowed.

Done in open court this 12th day of October, 1954.

/s/ SAM M. DRIVER,
United States District Judge.

Presented and submitted by: Signed R. Max Etter, John P. MacGillivray, attorneys for Plaintiff.

Approved as to form: Cashatt & Williams, signed by: Leo N. Cashatt; Cannon, McKevitt & Fraser; signed by: F. J. McKevitt, attorneys for defendant. [1100]

[Endorsed]: Filed October 12, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Northern Pacific Railway Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on July 3, 1954, and filed of record in the above entitled Court on said date, and from each and every part thereof.

Notice Is Also Given that the Northern Pacific Railway Company, a corporation, appeals to said court from that certain order entered in the above entitled Court on October 12, 1954, denying the motion of defendant, Northern Pacific Railway Company, a corporation, to set aside the verdict returned in said action and the judgment entered thereon or in the alternative for a new trial, and from each and every part of said order.

Dated this 4th day of November, 1954.

CASHATT & WILLIAMS,
/s/ By LEO N. CASHATT,
/s/ F. J. McKEVITT,
Attorneys for Defendant [1101]

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents that Northern Pacific Railway Company, a corporation, as Prin-

cipal, and Saint Paul Mercury Indemnity Company, Saint Paul, Minnesota, a corporation organized under the laws of the State of Delaware and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto Clara Stintzi, Guardian ad Litem of Gerald Stintzi, a minor, Plaintiff in the above entitled action, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said Clara Stintzi, Guardian ad Litem of Gerald Stintzi, a minor, her executors, administrators or assigns, and/or to the said Gerald Stintzi in the event he shall have attained the age of majority under the laws of the State of Washington at such time as the conditions of this bond may become effective; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of November, 1954.

Whereas, lately at the District Court of the United States, for the Eastern District of Washington, Northern Division, in a suit *de*pending in said Court between Clara Stintzi, Guardian ad Litem of Gerald Stintzi, Plaintiff, and the Northern Pacific [1102] Railway Company, a corporation, a judgment was rendered against the said defendant, Northern Pacific Railway Company, a corporation, in the sum of One Hundred Forty-eight Thousand Five Hundred Dollars ($148,500.00), and the said defendant, Northern Pacific Railway Company, a corporation, having filed in said Court a

Notice of Appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit at a session of said Court to be holden at San Francisco, in the State of California.

Now, the Condition of the Above Obligation Is Such That if the said Northern Pacific Railway Company, a corporation, shall prosecute said appeal and secure to the plaintiff the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
By CASHATT & WILLIAMS,
/s/ By LEO N. CASHATT,
/s/ By F. P. McKEVITT,
Its Attorneys
[Seal] SAINT PAUL MERCURY INDEMNITY COMPANY, St Paul, Minn.,
/s/ By JOSEPH L. COX,
Attorney in Fact [1103]

[Endorsed]: Filed November 5, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant hereby designates that the record on appeal of this cause to the United States Court of

Appeals for the Ninth Circuit shall contain the complete record of the proceedings in the above entitled court and all proceedings and evidence in the action, and particularly shall include, but not be limited to, the following:

1. Complaint in the Superior Court of the State of Washington for Spokane County.

2. Petition for removal.

3. Bond for removal.

4. Notice of filing Petition and Bond for Removal.

5. Official reporter's complete transcript of all the evidence and proceedings upon the trial of this cause.

6. Originals of all exhibits introduced in evidence on the trial of this cause.

7. Notice of Appeal.

8. Bond on Appeal.

9. This Designation.

Dated this 9th day of November, 1954.

CASHATT & WILLIAMS,
/s/ By LEO N. CASHATT,
CANNON, McKEVITT & FRASER,
/s/ By F. J. McKEVITT,
Attorneys for the Defendant

Acknowledgment of Service attached. [1105]

[Endorsed]: Filed November 10, 1954.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that a Notice of Appeal was filed in the above entitled cause by the defendant on November 5, 1954, and upon oral motion of counsel for the defendant, it is hereby

Ordered that the time to file and docket the record on appeal in the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby extended to and including January 31, 1955.

Dated this 26th day of November, 1954.

/s/ SAM M. DRIVER,
United States District Judge [1106]

[Endorsed]: Filed November 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington do hereby certify that the documents annexed hereto are the originals filed in the above entitled cause, called for in Defendant's Designation of Contents of Record on Appeal, to-wit:

Petition for Removal; Stipulation extending time

to appear; Summons—Superior Court—Complaint —Superior Court.

Bond for Removal.

Notice of filing Petition and Bond for Removal.

Motion for more definite statement.

Order granting motion.

Notice of joinder of counsel.

Amended Complaint.

Motion for more definite statement (Amended Complaint).

Answer to Amended Complaint.

Motion for more definite statement (Affirmative Defense).

Motion to Dismiss (Affirmative Defense).

Order ruling on Motions.

Plaintiff's Statement of Contentions.

Notice of Trial Amendment.

Defendant's Statement of Contentions.

Court Reporter's Transcript of Evidence, four volumes.

Defendant's Requested Instructions.

Defendant's Additional Requested Instructions.

Plaintiff's Requested Instructions.

Verdict for Plaintiff.

Judgment on Jury Verdict.

Motion to set aside Verdict and Judgment thereon and for Judgment in accordance with Defendant's prior Motions for a directed Verdict and alternative Motion for New Trial.

Order denying defendant's Motion to set aside Verdict and Judgment entered thereon and for Judgment in accordance with Defendant's prior

Motions for a directed verdict; and alternative Motion for New Trial.

Notice of Appeal.

Bond on Appeal.

Designation of Contents of Record on Appeal.

Order extending time to docket appeal to 1/31/55.

and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit as set forth in the Appellant's Notice of Appeal filed November 5, 1954, and as called for by Appellant's Designation of Record on Appeal.

I further certify that all exhibits admitted or rejected at the trial, to-wit:

Defendant's 1, diagram of track lay-out.

Plaintiff's 2, photo; 3, photo; 4, photo; 5, photo; 6, photo; 7, photo; 8, photo; 9, photo; 10, photo; 11, photo; 12, photo; 13, photo; 14, photo; 15, photo; 16, photo.

Defendant's 17, statement of Allan Maine.

Plaintiff's 18, statement of Allan Maine.

Defendant's 19, statement of Joe Vallorano.

Plaintiff's 20, photo; 21, photo; 22, photo.

Defendant's 25, work instruction sheet.

Plaintiff's 26, color slide; 27, color slide; 28, color slide; 29, color slide; 30, color slide; 31, color slide; 32, color slide; 33, color slide; 34, hospital bill; 35, Schindler bill; 36, miscellaneous checks.

Defendant's 37, aerial photo; 38, record of perishables 7/17/52; 39, page from Salt Record; 40, page from car turnover record (sheet 6); 41, statement of Boyd Q. Craig; 42, contract between Northern Pacific Railway Co. and Addison Miller; 43, diagram of ice platform; 44, photo; 45, photo; 46, photo.

Plaintiff's 47, portion of Rule 805; 48, photo—rejected; 49, photo—rejected; 50, photo.

Defendant's 51, Rule 805.

are forwarded herewith, but not attached hereto, except Exhibits 1, 37 and 43, which are forwarded under separate cover to Clerk, U. S. Court of Appeals, Post Office Building, San Francisco, California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 18th day of January, A. D. 1955.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, U. S. District Court, Eastern District of Washington.

In the District Court of the United States, Eastern District of Washington, Northern Division

Civil No. 1052

CLARA STINTZI, Guardian ad Litem for Gerald Stintzi, a minor, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Monday, the 28th day of June, 1954, before the Honorable Sam M. Driver, Judge of the said Court, and a jury; the plaintiff being represented by John D. MacGillivray, R. Max Etter and John T. Day, her attorneys; the defendant being represented by Frank J. McKevitt, appearing for Cannon, McKevitt & Fraser, and Leo N. Cashatt, appearing for Cashatt & Williams, its attorneys; [49*]

Whereupon, the following proceedings were had, to-wit:

The Court: Are we ready now with Stintzi against Northern Pacific?

Mr. Etter: Plaintiff is ready.

Mr. Cashatt: Defendant is ready, your Honor.

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* Page numbers appearing at foot of original Reporter's Transcript of Record.

(Whereupon, a jury was duly impaneled and sworn to try the instant cause, after which the following proceedings were had:)

The Court: Now, ladies and gentlemen, this trial will perhaps last several days. It is not going to be a very long trial and not a very short one, either, I think probably three or four days. During that time, we will hold court here ordinarily from 10 to 12 in the morning and from 1:30 to 4 or 4:30 in the afternoon, and then you will be permitted to separate and go your several ways during the noon recesses and the overnight adjournments.

But I want to caution you about discussing the case. You shouldn't discuss it with anyone at all, certainly, outside of the jury. Just tell them you are on the jury and can't talk about it at all. And it is best, also, for you not to even discuss it among yourselves during these [50] recesses or adjournments. Just don't talk about the case. Talk about the weather or something else. Wait until the case is submitted to you finally for your deliberations.

And, also, it is important that you keep an open mind in this case until you have heard all of it on both sides. Naturally, you have to proceed with these cases in some kind of order, and the order here will be that the plaintiff will put on its evidence first. The lawyers will make their opening statements to you first, what they propose to prove, and then put on their evidence, have their witnesses testify, and the plaintiff gets all through then before the defendant comes on. Then the defendant

brings its witnesses on and you will hear all of those witnesses. Then, if there is any rebuttal, you get the rebuttal, and after that the attorneys argue the case and then the Court gives you the instructions as to the rules of law you are to follow, and then you are free for the first time to talk it over among yourselves and make up your minds about what you are going to do. Up to that point, you should keep an open mind and hear both sides and all of the evidence before you make any decision.

And, also, if there is any newspaper account of this trial or radio broadcasts, just skip that part of the news. It is better for you to get all of your impressions from the witnesses in the trial and not a second-hand account [51] by some reporter who is reporting what he considers has gone on here.

Now I am going to take a recess until 1:30. Before I do so, I will excuse the remaining jurors here.

Court will recess now until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had:)

The Court: All right, proceed.

Mr. Etter: Your Honor, in order to expedite it, we have talked this matter over with counsel for Northern Pacific and they have prepared a large scale chart of the yards, the switching yards, which are very involved, and with your Honor's permis-

sion, it is an exhibit of the defendant, but we have agreed that it may be placed upon the board which has been constructed at the back and set here in a position so that the jury has a better idea of what we are talking about. Then, if your Honor will permit us, we will make the opening statement and proceed with the case.

I think probably it will expedite the matter and avoid a lot of confusion.

Mr. Cashatt: That is agreeable with us, your Honor.

The Court: That is all right, you may do that.

I think it is stipulated, then, that the map may be admitted as an exhibit?

Mr. Etter: As an exhibit of the defendant, your [53] Honor.

The Court: Defendant's Exhibit 1?

Mr. McKevitt: Yes, your Honor.

The Court: The Clerk will so mark it.

(Whereupon, the said map was marked as Defendant's Exhibit No. 1 for identification.)

(Whereupon, the said map was admitted in evidence as Defendant's Exhibit No. 1.)

Mr. Cashatt: It has also been agreed, your Honor, that a representative from the Engineering Department is here and will explain what the map is.

Is that correct?

Mr. Etter: That is correct, so stipulated, with your Honor's permission.

The Court: All right. I suggest, however, that

you have him sworn so that his testimony may become a part of the record.

Mr. Etter: Certainly, your Honor.

The Court: We haven't an easel big enough to support that, but I support you plan to just put it on the floor there.

Mr. Etter: And we can remove it after we have [54] explained it, your Honor.

W. D. O'HEARNE

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Just step over here, Mr. O'Hearne.

Would you just state your full name again, please? A. W. D. O'Hearne.

Q. And, Mr. O'Hearne, by whom are you employed?

A. Northern Pacific Railway.

Q. And in what department, sir?

A. Division Engineer, in the Engineering Department.

Q. And are you located here in Spokane, Washington? A. Yes.

Q. And how long have you been connected with the Northern Pacific in the capacity that you have just told us?

A. Since the first of last July.

Q. And previous to that, Mr. O'Hearne, what was your occupation?

(Testimony of W. D. O'Hearne.)

A. Well, Assistant Engineer a couple of years and instrument man since '42—or a year before that.

Q. In your work, Mr. O'Hearne, you have to do with the preparation of maps and drawings, and so on, for the [55] Northern Pacific Railway?

A. Yes, sir.

Q. Is that done under your supervision?

A. Yes, sir.

Q. And referring, Mr. O'Hearne, to Defendant's Exhibit No. 1, will you tell us what connection you had with the preparation of this exhibit?

A. Well, I went out and made—with the crew to make the survey, and then the map is made under my supervision.

Q. Mr. O'Hearne, will you proceed and explain to the jury just what is shown here, where it is located, and possibly you could do that without further questioning at this time?

A. Well, the top of the map is north, the bottom is south, east, west (indicating). This is what they call the icing platform, runs down this way. And here is what is called the salt house. That is underneath the icing platform.

This building here is the shed where the ice comes up. Well, maybe I better start over here. Here is the ice plant across the tracks.

Juror No. 7: We can't see the map back here.

The Court: You have trouble seeing it?

Juror No. 7: Can't see it at all. It is very indistinct to me, Judge. [56]

(Testimony of W. D. O'Hearne.)

Mr. Cashatt: Your Honor, could we place it up here and put a chair behind it?

Mr. Etter: We can hold it up.

The Court: I think one difficulty is the lighting here. I have made arrangements to have the lighting modernized in here, but it won't be done in time to help.

Mr. Etter: We can hold it.

The Court: Yes. I think that is better, isn't it?

Several Jurors: Yes.

A. (Continuing) This is the ice plant here (indicating), and this is the tunnel underneath the tracks over to the icing platform. And here is the tunnel shed where the ice comes up through here and goes up to the top of the icing platform and rungs along the platform. These are the tracks where they are iced, this track and this track, tunnel Track 13 and 12.

This map is drawn one inch equals 20 feet on the ground.

Do you want me to tell about the doors, and so on and so forth?

Q. (By Mr. Cashatt): I might ask——

The Court: Pardon me just a minute.

Can you raise the whole blind up? I think we will get more light here. Pull it clear up there.

It is sort of a tradition that a courtroom has to [57] be like a cheese cave. I don't know why, I would just as soon have some daylight myself.

Go ahead.

(Testimony of W. D. O'Hearne.)

Q. (By Mr. Cashatt): I might ask you a few questions, it might help to illustrate.

Mr. O'Hearne, where we see two lines, two dark lines, like you see running east and west here, here, and on down the map, what do those two lines represent?

A. That two lines indicates the two rails.

Q. I see.

A. These are switches (indicating); this is a lead track or a ladder track that cars come down. They do their switching in here, come down these separate tracks at these turnouts or switches.

Q. And I see a designation on each two lines, then in the center there is a designation "Track 14," and farther on down Track 3, 2, 1, and so on. Now what significance does that have to the yard out there? A. Well——

Q. By that I mean is that the number of this track?

A. That is the number of a certain track, yes.

Q. I see. On the far end of the west end toward Mr. Etter, there is——

A. That is the yard office and the locker room for the yard men. [58]

Q. And this area is located, Mr. O'Hearne, out at Yardley, Washington?

A. Well, we call it Parkwater.

Q. Parkwater. It is also sometimes known as Yardley, is it? A. I guess it is.

Q. On the west end where Mr. Etter is standing,

(Testimony of W. D. O'Hearne.)

is there any street or any landmark that we could tie this to?

A. Well, I believe it is Havana Street just west of there. I think it is the city limits.

Q. That would be the east city limits of Spokane, Washington?

A. That is what I understand, yes.

Q. And on the east end, is there any landmark, any street or anything?

A. Quite a ways up here is what they call Fancher Way or Fancher overhead crossing.

Q. That is a street which runs north and south, I believe; is that correct? A. Right.

Q. Now I see the map cuts off at this location here above your dotted lines. Are there other switching tracks, and so on, in the Northern Pacific yards at Parkwater or Yardley which are not shown on Defendant's Exhibit No. 1? [59]

A. Yes, sir.

Q. To the south, Mr. O'Hearne, is this the most southerly track of the yard, the one that I am pointing to?

A. This lower track continues on farther to the west.

Q. But that would be the most southerly track in the Northern Pacific yard in Parkwater; correct, sir? A. Yes.

Q. You mentioned before, Mr. O'Hearne, about a tunnel. Will you point that out again and show where that runs, now that it is up in the air?

A. That originates at the ice house here and

(Testimony of W. D. O'Hearne.)

runs across over to this shed underneath the tracks, indicated by "Tunnel" here and this dash line.

Q. Now when you say "ice house," I see on Defendant's Exhibit 1 you have marked "Ice Plant." Is that where the ice——

A. They manufacture the ice there, yes.

Q. And you have marked on Exhibit No. 1 "Icing Platform." Is that the end of the platform as shown? A. No, sir.

Q. Go ahead and explain that, please.

A. Well, I don't know exactly how far down here it runs. It runs for a considerable distance.

Q. But is that as far as was taken in?

A. That is as far as taken in on this map, keeping it as [60] small as we could.

Mr. Cashatt: Mr. Etter, do you have any questions?

Mr. Etter: Yes.

Cross Examination

Q. (By Mr. Etter): Mr. O'Hearne, would you take this red pencil, please, and would you point out Track 13 for us?

A. (Indicating on exhibit.)

Q. That is Track 13.

A. That is Track 13.

Q. And, with Mr. Cashatt's consent, would you bring a red line along Track 13, possibly between the middle of the two blackboards, Mr. Cashatt, up to the lead track?

Mr. Cashatt: That is satisfactory.

(Testimony of W. D. O'Hearne.)

A. How far this way? From the tunnel shed, salt house?

Q. (By Mr. Etter): Let's see, from the salt house, yes, just bring it from the salt house right up to the lead track.

A. (Drawing on exhibit.)

Q. You can space that, if you want, Mr. O'Hearne, that red line, rather than draw it all the way. A. (Witness complies.)

Q. All right, fine. Now you have traced it, have you, from the salt house to what you call the lead track? [61] A. Yes, lead or ladder.

Q. Lead or ladder.

A. This the ladder track right here (indicating).

Q. Now, also, can you point out up at this west end of the chart where the track is which is referred to as the "Main" or "Old Main?"

A. There (indicating).

Q. Would you mind taking it from this last switch where it switches off on to the lead and bringing it in here about, oh, three inches, just to show where it intersects there?

A. (Witness complies.)

Q. All right, and could you trace with your red pencil down the lead about three or four inches?

A. Down the lead?

Q. Down the lead, yes, up to that second switch.

A. (Witness complies.)

Q. Oh, yes, would you do this, then, for us: Will you take this red line from the yard office and connect it up with your red marks there the same way?

(Testimony of W. D. O'Hearne.)

A. (Witness complies).

Q. That is fine. Will you take these and continue those down to Track 13?

A. (Witness complies).

Mr. Cashatt: Have you finished? [62]

Mr. Etter: Yes.

Redirect Examination

Q. (By Mr. Cashatt): How high is this icing platform from the ground?

A. Well, from the top of the tie, which is practically ground level, it is 15 feet, plus an inch or so difference.

Q. 15 feet?

A. 15 feet, maybe plus an inch.

Q. That was the height the icing platform is from the ground, is that what you just told us?

A. Yes, top of the tie or the ground.

Q. And how wide is the platform? Can you tell us how wide the icing platform is?

A. Well, I would have to scale it or look it up.

Q. And the scale, again, you said?

A. One inch equals 20 feet.

Q. I see.

Mr. Cashatt: Can you think of anything further, Mr. Etter?

Recross Examination

Q. (By Mr. Etter): You may or may not know, Mr. O'Hearne, do you know how [63] many white illuminating lights there are on top of the ice dock?

A. No, I don't.

(Testimony of W. D. O'Hearne.)

Q. You do not?

A. There is some located on here.

Q. But you don't know the number?

A. I don't know the number, sir.

Q. All right. Or the length of the dock?

A. No, sir.

Q. I see. A. I didn't measure it.

Q. Could you give us any idea offhand, if you know, of the distance between these two switches which appear on the west end of the chart in front of the yard office, could you tell us or could you approximate, or do you know, let's put it that way, the distance between that point on the chart and going east until you reach the salt dock, assuming that a car started on Old Main and went off of the lead and turned and was put on to 13 down on the salt dock? Could you tell us how far that is?

A. Well, I could give it to you approximately.

Q. Approximately? A. About 2,050 feet.

Q. 2,050 feet? [64]

A. Something like that.

Q. It is over 2,000 feet, however?

A. Well, it is——

Mr. MacGillivray: Can't we measure it on the map?

Mr. Etter: We can.

A. Yes.

Mr. Etter: Just for purposes of explanation.

Q. Have you any idea how far it is from the point where the car that come off of the lead on to Track 13 up to the edge of the salt house?

(Testimony of W. D. O'Hearne.)

A. You mean from the switch point or——

Q. From the switch point, that is, the switch point off the lead down to the salt dock on the east end?

A. Well, I can tell you how far it is from right there (indicating).

Q. All right. A. 1,201 feet.

Q. 1,201 feet. Thank you.

Mr. Etter: That is all the questions I have.

Mr. MacGillivray: For the record, 1,201 feet is from Switch 13——

A. To the center line of the door into that tunnel shed.

Mr. Etter: Salt house?

A. Well, it is a little west of the salt house.

Mr. Etter: West of the salt house, all right. [65]

Further questions?

Mr. Cashatt: That's all I have.

The Court: I am not sure that the record shows, but it should show that this map, Defendant's Exhibit 1, is admitted in evidence.

Mr. Etter: Fine.

Mr. Cashatt: Mr. O'Hearne may leave now?

Q. (By Mr. MacGillivray): One other question I might ask, what is the distance from the north edge of the loading dock to the southerly track of Track 13? A. How is that again?

Q. From the north edge of the loading dock, or let's say at the salt house, to the southerly track of Track 13?

A. You mean the southerly rail?

(Testimony of W. D. O'Hearne.)

Q. Southerly rail, yes?

A. I don't know exactly.

Q. Could you measure it and tell us?

A. (Measuring) Well, it is about 4 foot and nine-tenths from the edge of the rail, from the rail.

Mr. McKevitt: To what?

A. To the edge, the north edge, of the icing platform.

Mr. Cashatt: Would that be on the ground, Mr. O'Hearne?

A. That is 16 feet up in the air. [66]

Mr. Cashatt: I see.

Mr. Etter: All right. Now is there some place we can put this thing?

The Court: Put that down on the floor. Can the jurors see it there during your opening statement?

Mr. Etter: May I proceed, your Honor?

The Court: All right.

Opening Statement

By Mr. Etter:

Ladies and gentlemen of the jury, as the Court indicated and as you people who have had jury service understand, in the procedure of the trial the plaintiff makes an opening statement. The opening statement is a statement by the party in the litigation of what we expect to prove on behalf of the plaintiff; in other words, the statement is to give you an idea of the evidence that we are going to bring here to you, the witnesses that are going to be here and what they are going to testify to.

In fact, it is a narrative statement of what we expect to prove to you.

Now I might say that we are going to show by the evidence that Gerald Stintzi, the minor boy who was injured who is seated at the table, was about 17 years of age at the time this accident occurred. The accident occurred on the 17th of July of the year 1952 at what has been [67] designated or indicated as Yardley, Washington or Parkwater, Washington. In any event, it occurred in the area which is represented by the chart or the Defendant's Exhibit 1 which has just been explained to you, it was in this area, and, as I will show you later, the accident immediately occurred at the salt dock or thereabouts which was pointed out to you as being on the east end of the chart.

The evidence will show that there are extensive switching operations going on in this particular area at all times; that is, at both ends, both east and west ends of the tracks, and as the chart indicates and as you notice, the proof will show that there are a number of tracks used for yard service besides other tracks which were indicated by Mr. O'Hearne as being north of this particular chart, in other words, other tracks that may be referred to here in the testimony before we get through.

As you note, these tracks run in an easterly and westerly direction. In this direction, we have the west over to our left, down here the east, and, of course as he pointed out, up is north and then down is south.

The evidence will further show that at the time

this accident occurred there was a considerable amount of activity being carried on at what has been referred to—I will walk up here and point it out to you again—as the so-called icing platform, in and about the icing platform [68] and the salt house.

I might explain to you while I am here, and it is diverging a little from the exact narrative but it will be a further explanation, we will show that down in this part of the chart which appears on the west end and which is designated "Ice Plant" on the chart is the place where ice is manufactured and prepared by the Addison Miller Icing Company; that the ice is frozen in the blocks and then it is sent underground by virtue of a conveyor belt which goes in a northerly direction from the ice house underneath all of these tracks which you see running in an easterly and westerly direction and crosses under these tracks to a point which is indicated under the designation "Tunnel Shed." This ice, when it comes into the tunnel shed on this conveyor chain, as it comes into the opening it makes a turn in the direction of the west in the tunnel shed and it is then, of course, the lower level and underneath the ground level or the track level of the shed. This conveyor belt brings it around and it is operated in such a fashion that the conveyor belt as it comes around turns in an upward direction. The ice is then brought up to the top of the platform, which, as testified to by the engineer, is approximately 15 feet above the ground entrance upon which the tracks are laid.

We will show that this ice comes up to the top and then it comes out on a conveyor belt. This conveyor [69] belt extends in a westerly direction down the extent of what is known as the icing platform and all of which is, of course, 15 feet above and built as a platform in that direction. The ice, after it is brought up there, then is pulled off, taken off this conveyor and, as cars are placed along these different tracks, 12 and 13, for the purpose of icing, the ice is shifted on to the top of the car where it is broken up with a pick-like looking instrument and the cars then are iced through the top. That is essentially the proof of the icing operations without going into the other circumstances of the incidental work in it.

Our proof will show, too, that on this icing platform there are ranged two rows of overhead lights, that is, of white variety, extending down from the salt house and where the opening comes onto the icing dock from whence the ice is brought on the conveyor belt, extends on the north side all the way down in a westerly direction for a distance of approximately 1,300 feet, we will show that the distance of that dock is approximately that, and that these overhead lights are spaced at about every 50 feet and that there are 27 of them on the north side of the platform and that at irregular intervals and spotted on the south side are 27 more, making a total in all of some 54 overhead illuminating lights on this icing platform.

We will show further that there is a salt house [70] at the east end of the icing dock, and that salt

is loaded into three openings in the salt house, is brought in by freight car, and is hand-trucked across platforms laid from the freight car into the opening of the salt house. This salt is trucked into the salt house here; that there is a conveyor belt in the salt house which runs from the ground up to the top of the salt house, or rather onto the loading platform which is above the salt house, and which is the same platform as is indicated on the chart. These sacks are placed on this conveyor and, as they are wanted, they are taken up on this belt, one sack after another, up to the top, 15 feet, where they are taken off. In other words, the proof will show they are brought in from the freight cars into the salt house, then taken up on a conveyor belt up to the top of what is known as the icing platform where the further operation is taken care of.

The evidence will show that there is a great deal of switching activity in this yard at all times and that particularly is that so with reference to the icing dock and the area about it during the summer months when there is a considerable shipment of fruit and where car icing is required during the specific summer season.

There are also two lights which hang here and which can be either hung out to the side, that is, to the north or south of the ice house, which are small blue lamps [71] on the west end of the ice house, and likewise further down in this direction, down the platform in a westerly direction and probably out of sight, there is another small shed

with what appears to be a bar, we will show, across it, in which two lights of blue color are also set. So that is the proof that we will show as to the general arrangement that exists there.

We will likewise show this to you, ladies and gentlemen, that between Tracks 13 and 14—Track 14 is the track on the chart which is north of Track 13 and north of the salt house and the icing dock—that between there it has been an habitual practice to take debris and unloading material of all types in rather a declevity in the ground and carry it over and dump it here, and we will prove by the evidence that this whole area in between Tracks 13 and 14, at the time the accident occurred, prior thereto, and since, is an area generally used for throwing old material and dumping ashes and water and ice and all other types of substance, that is, between Tracks 13 and 14.

The evidence will show that on the 17th day of July, the day with which we are concerned, as I said, young Gerald Stintzi was 17 years of age. We will show that he lived with his mother at East 420 Olympic in this city, also with his younger brother who is now of the age of 14 and who was then about 12, and a young sister who is now of [72] the age of 10 and was then about the age of 8.

We will show that at this time Gerry was in his sophomore year at John Rogers High School; that he was a sterling and outstanding freshman athlete: that the economic situation of his family was such that he was depending upon an athletic scholarship to complete his college and high school edu-

cation and embark upon a medical career; that at the time in question and since he had been in the 8th grade, he had shown a greater than average ability for athletics, particularly the track events and the middle distances, the one mile, a run of that kind, and the evidence will show here that at that time and in his freshman year he was considered probably one of the most excellent prospects in this area for timber of varsity and championship caliber in those events; that he likewise was a boy who like to associate in his church activities and did considerable singing, was a very accomplished dancer, and in general was an average, normal youngster in his activities and in his associations, both in school, in athletics and otherwise.

The evidence will show that he was working for the Addison Miller Company on the day in question; that likewise at that time there were these shifts being worked by the Addison Miller Company, who were engaged in the icing operation which I have tried to explain to you as briefly as I could here; that there were about 25 to 30 men —and I [73] refer to men, I include these men and boys who were engaged in this operation in its various aspects—and that along with Gerry that evening on the particular crew doing the work that he was doing was a young fellow who was then about 16 years of age by the name of Allan Maine, who will also testify in this case; that likewise in that group was another man by the name of Joe Vallorano, and another man comprised it who is now in Canada, or who is a resident of Canada, but

there were four men engaged in the particular operation at the time of this injury sustained by Mr. Stintzi.

In addition to the general arrangement which I have pointed out to you there, at the time that the accident occurred we will show, too, ladies and gentlemen, that there was a phone system in use which was in the yardmaster's office and which connected with the Addison Miller icing dock at the top of the dock which appears here. There were interphone communications between the yardmaster's office and this office; that likewise some distance east of the salt house and the icing platform, which can be seen here on a pole, that is, a short distance to the east and on a pole, there was also mounted at the time this accident happened a loudspeaker system. This loudspeaker system was also controlled by microphone from the yardmaster's office, which appears here. We will show that the yardmaster controls and did control the general switching operations in the [74] yard and was responsible for them; that this microphone which I have described to you and which we will show was mounted on a pole in this wise, so that one of the horns was pointed in a westerly direction and mounted and facing the other way was a megaphone or horn which was directed in an easterly direction; that the phone system and the loudspeaker system were both there on the evening that this accident occurred.

These boys had been working, that is, Allan and Gerry Stintzi, I will say "this boy," had been

working about a week. He had gone to work and we will show was earning money for the purpose of his schooling and that some of the youngsters at John Rogers High School and other people did that during the summertime. The shifts were ordinarily shifts that commenced at 7 in the morning; one shift was completed at 3; the swing shift, ordinarily that commenced at 3 o'clock and went through until 11 o'clock; and then the other shift that was on at 11 o'clock, graveyard, I suppose you would call it, was completed at 7 in the morning; that at the time of the accident, three shifts were working; that Mr. Stintzi, young Stintzi, was working on the 3 to 11 shift and had gone to work that day, along with Allan Maine and these other people whom I have mentioned to you, at 3 o'clock; that they worked in the general operations and in response to the orders of their superiors around there from 3 o'clock [75] until it was time for lunch or dinner, which they took somewhere between 6:30 and 7 o'clock on the evening of the 17th of July.

After they had gone to lunch and had returned and sometime between 7:30 and 8 o'clock, possibly closer to 8 o'clock, on the 17th, the evidence will show that the foreman of the icing dock, a man by the name of Fincher, instructed young Stintzi to take himself two or three men of a crew and to go down into the part which we refer to here as the tunnel, in other words this tunnel shed or ice dock, just the shed before the ice dock, and clean out the slush ice that had accumulated. This slush ice accumulates in a sump pit which appears just about where the conveyor chain turns as it comes from a

southerly direction, and as it turns westerly and upwards in this particular house there is a sump pit which is off down to the side and the ice accumulated down in there, scrap ice, and Stintzi was directed to pick up a few men and to clean out this sump pit. The cleaning of the sump pit was done with a 5-gallon container or pail, just a big bucket.

So Stintzi and Allan Maine, his friend, Joe Vallarano, and the Canadian whom I have referred to, composed the crew of four who took upon themselves the job, under the direction of the foreman, of the cleaning out of the sump pit. [76]

The evidence will show that the foreman told these boys when they took the ice out, the slush ice, to take it across the track and dump it over toward Track 14; that he gave them those specific instructions; that thereupon these boys commenced this work and it was carried on in this wise:

They would fill this 5-gallon bucket, and they will testify as to its weight, by one of the men who would fill it from the sump pit. Then it was carried on alternate occasions by Allan Maine and by Gerry Stintzi together. They would walk up the stairs of this particular pit and when they got up the stairs there was an opening, there was an opening right in this area or a door, they would come out the doorway and then they would walk a little bit east, they would go up a little bit east where there was a break, or not a break but where two freight cars were locked together. There was at that time a string of cars running in an east and west direction on Track 13 and those cars extended

up several cars in the easterly direction, while in the westerly direction there were a number of cars, or rather quite a long string of cars. The short string was in the easterly direction, I should say, up this way, and the long string was in the westerly direction, that way.

These boys would bring the ice in this slush box, or rather this can, they would go up and then they would take [77] it across the Track 13 over toward 14, in between 14, and they would dump it. On alternate occasions, Joe Vallorano would carry it up with one of the other boys. Their manner of getting it across the track, they would go where the two cars were coupled and the two boys would stand one on each side of the break between the cars where the coupling was, and they would take this heavy bucket and the two of them would swing it over underneath the car, after which one of the boys would slide through to the other side and it would be pulled over on this side and dumped. The boys would dump it, come through and they would carry it over, and they would dump it over between Tracks 13 and 14. They would then walk back on this side of the track and one of the boys, Allan Maine or Mr. Vallarano or Gerry Stintzi, whoever it happened to be, alternate occasions, would go through underneath the coupling, and the other boy then would shove the empty bucket back over to him on the other side and the other boy would reach for it and pull it out. Then they would both go back down into the ice house for the purpose of bringing up this slush ice.

Now on the night in question, these men had been doing this job and had probably made between 9 and 13 trips down from where they were cleaning the slush ice out of the sump up to the top, out of the door of the ice house, underneath the coupler and over where the ice was dumped on [78] alternate occasions.

At the time this occurred, Mr. Vallorano and the other man were down in the house, while Gerry Stintzi and Allan Maine were then doing this particular work of carrying the ice up in this bucket.

At about 8:15 or 8:20, the evidence will show, these two youngsters, Allan and Gerry, had come out of the ice house, out of the door of the ice house, they were carrying this 5-gallon bucket of slush ice, they came out of the ice house and turned a little bit in an easterly direction, they went across in the manner in which I have described, they went across the track right here, dumped the ice and had started back. They came back to where the track was laid, and Allan Maine went through the cars first, and when he was on the other side of the cars, Gerry Stintzi stepped across to hand the bucket to him.

Just sometime prior to that, there had been a switch movement carried on in the yard. A string of 14 freight cars had been brought on to what is known here as the "Old Main" from what would be designated and, as Mr. O'Hearne indicated, was not in the chart, would be Track 43. These cars, along with other cars, were brought onto Old Main and taken by the train and transferred in a westerly

direction to a distance somewhere west of the yard office. Then a movement was commenced in which the cars were moved [79] back, that is, the 14 to which I referred, were moved back in an easterly direction, and as they were moved back in an easterly direction, they pulled the pin or kicked, or whatever you want to call it, these 14 cars loose from the train at a point immediately in front of the yard office, and these 14 cars, our proof will show, unattended by anybody, not attended by anybody, with nobody riding the front or back and 14 in all, were allowed, as a result of the kick or of pulling the pin, to drift down in an easterly direction from the west along Old Main, as you see it, onto what is known as the lead track down to Switch 13, onto Track 13, and proceeded down in this direction from the west toward the tunnel shed, the salt house and the icing platform, these 14 cars; that at that time, the lights on this shed, some 54 of them, were all lighted and the crew had been working on that shift and the shift before, and our proof will show that there was no warning given by phone; that there was no warning given by the loudspeaker; that there was no warning given by word of mouth; that these cars were allowed to be floated down, so-called, or kicked off of Old Main up at the front of the yard office and down in the direction in which I have described which is indicated on this chart; that just at the time this boy handed the bucket over to Allan Maine and while both of them were reaching for it, there was a terrific jolting by impact of the 14 cars which [80]

had been shifted in the direction where these boys were working.

At the time of impact, the boy, Allan Maine, the edge of the car came toward him and he grasped a rung on the side of the car and hung on to it. The other boy, the proof will show, Gerry Stintzi, was in a position where he couldn't grab anything, and he was caught from the back and before he could do anything, he was thrown upon the track and the movement of the cars dragged him along for a distance of well in excess of 120 feet as a result of the impact.

The boy, Allan Maine, hung on all the time and was dragged and suffered some injuries of the face and other injuries. Gerry Stintzi was dragged along the track, as I have said, a distance of in excess of 120 feet.

The evidence will show that he was screaming at the top of his voice; that he, however, did not lose consciousness; and that Mr. Vallarano had run upstairs when he had heard this crash and that he had run up on the ice dock and looked down and saw this boy and immediately headed down through the tunnel in the direction of the Addison Miller Company for the purpose of getting an ambulance, and that he did call for help and that he did go outside and wait and direct the ambulance into the area where the boy had been injured; and that he laid there 25 to 40 minutes before the ambulance was brought and that he was then taken to the [81] hospital.

The proof will show that during the course of

the movement of the train along the tracks and over this boy, immediately after they got him to the hospital our proof will show that his right leg had been traumatically amputated at the hip joint; up at the hip joint; not here, but at the hip joint; that the proof will show that the skin of the entire right side of the abdomen and of the buttocks on the right side of the leg had been torn completely out and off, and that the lacerating wounds that had been caused by the traumatic amputation of the leg had extended over to the right and up into the rectum of the young man; that there had been, as a result of this traumatic amputation, evulsion of the right scrotum and that there had been a complete rupture of the urethra. Likewise during the course, as the evidence will show, of his being dragged down the track, he sustained what we call a comminuted fracture of the left leg at the junction of the middle and the upper third of the leg, and that likewise the contusions as a result of that injury that he sustained went up beyond the knee and into the break and then on up into the left hip joint; that likewise his arm had come in contact, that is, his right arm, with the train as it rolled along and severed the right leg at the hip and it rolled over and broke both bones of the right forearm and that he suffered a compound fracture of both [82] bones of the right forearm.

The testimony will show that he was then immediately removed to the hospital where he was immediately given two blood transfusions; that a short time after he was given the blood transfusions, the

two blood transfusions, a guillotine re-amputation of the right leg was performed. The doctor will testify of the necessity for performing a guillotine amputation in order to take out the rocks, stones, grease and debris which had been ground into the lower tissue and down into the parts of the hip where the leg had been severed.

At that time likewise, the evidence will show, the right testicle of the youngster was replaced in the scrotum and that tissue was taken away from the lower abdomen and was used to cover over the scrotum repair which the physicians made at that time. Immediately after that, he was given a third and fourth transfusion.

I might say that during the course of his stay in the hospital, which extended to a period of time of 256 days, Gerry was given 19 blood transfusions during the efforts that were made at that time to restore him.

The evidence will show that there were splints placed upon the right forearm and upon the left leg, and other treatment, of course, was administered to the wounds which he suffered, both to the extremities, which I have [83] described to you, and likewise internally.

The evidence will show that on July 23rd he was removed again to surgery where further surgery was performed by way of a further amputation and work upon the right stump, and at that time there were four pins inserted by way of a brace down the left leg, which had then developed where it didn't appear there was going to be usage, and these

pins were put in the left side of the leg and down into the bone to attempt to get union and repair of the left leg.

We will show by the testimony that again on August the 4th he was taken to surgery, after he had received further blood transfusions, for the purpose of skin grafting; that on August 13th he was taken to surgery again for further skin grafting; on September 5th again for further skin grafting, and that skin grafting was performed as to the entire area of the traumatically-amputated right leg from the hip on down to the area just next to the rectum and below the scrotum; that likewise this skin grafting was carried on over the entire section of his stump which had been torn and lacerated by virtue of the accident, and patches were also placed upon the right side of his body, and we will show you the results of those skin grafts with slides which we have and which will be shown here to you for the purpose of showing just exactly what these injuries consisted of. [84]

The evidence will show furthermore that on October 7th this young man was again taken back to surgery, and at the time he was taken back on the 7th, the evidence will show that in the repair of the right forearm and in its union, there had been a growth of a bridge of bone in between the two places where it had been broken, and it was necessary to reopen that entire arm by surgery and take out this bone bridge before it was closed and repaired again.

On February 24th, surgery was again performed

with regard to both the leg and the plastic work, and the evidence will show that he has been in attendance for this injury since that time.

It will be shown that a prosthetic device by way of an artificial limb was specially made to see if this young man could possibly use an artificial limb. Our evidence will show that for months this thing has been fashioned and tried, he has tried to use it, but that to this day he cannot, and the doctor will express his opinion on this boy's ability to ever wear an artificial limb because of the type of amputation which he has sustained.

We will show furthermore that this young man since this accident has done everything that he possibly could to try to rebuild his physical being; that he has gone to the YMCA where he has tried to swim, where he has lifted dumb bells and one thing and another to try and develop and [85] bring back his body; that he is unable, however, and has had to cease that because of the injury to the right arm which has not responded and because of the fact that there is a complete deadness of the use of two of his fingers and of the use of the wrist and in flexion and extension of his arm which he has not been able to develop; that furthermore, as a result partly of the injury, our evidence will show, and partly the attempt to wear this leg, there has now developed a further discharge in the stump of the leg and that there has been further infection as of this date which will require a considerable amount of work, our evidence will show.

The testimony furthermore will indicate that there

is a doctor's bill at present of approximately $3,000; that the hospital charges are approximately $7,000, at least somewhere in the neighborhood of $6,678; that special nurses who were in attendance on Gerry at the time of this injury and when he was brought to the hospital, the bills of those special nurses will be in the neighborhood of $2,165; that the prosthetic devices, the brace and the leg and the other things which he has secured in an attempt to rehabilitate and walk, are of a price of somewhere in the neighborhood of $670; and that there is a total medical expense thus far incurred by Gerry Stintzi in a total of somewhere between $12,500 and $13,000 as of now.

Our evidence will further show that at this time [86] this young man is unable to use another leg; he is constantly confined to crutches; he can't work and can't get a job, though he has tried to. He has lost a great deal of the use of the right arm, deficiency of the left leg, and, of course, the right leg severed completely. He is unable to do the things about the home, his own toilet necessities that ordinarily are required of all of us; that he must be assisted in those by his mother as to taking a bath; and that he still suffers by virtue of the injury to the urethra in a burning sensation that occurs every time he is compelled to urinate or do anything that is required; that these things are constant with him.

Our evidence will show that during the period of his stay in the hospital, he suffered excruciating pain and that that has not ceased, and the testimony here will indicate the permanent and complete dis-

ability and the loss of the expectancy of any earnings or of his desire to be a physician or other professional man after these witnesses have testified.

That, ladies, and gentlemen, will be the evidence that we expect to prove to you by the witnesses whom we intend to call in this case.

The Court: Do you reserve your statement?

Mr. Cashatt: With your Honor's permission, I would like to give it at this time. [87]

The Court: Yes, all right.

Opening Statement

By Mr. Cashatt:

If your Honor please, ladies and gentlemen of the jury: I have decided to give my opening statement at this time in order that you would be somewhat acquainted with the position of the defendant in this case as the witnesses are called and the case proceeds.

Our evidence, ladies and gentlemen, will show that the Northern Pacific yards at Parkwater or Yardley are a large operation. It is one of the largest switching yards on the Northern Pacific system, possibly the largest between St. Paul and the Coast.

Our evidence will show that on these tracks, as are shown and designated on Defendant's Exhibit No. 1 and over the other tracks which are out there—I might say this area, our evidence will show, runs about one mile from Havana Street to Fancher Way and approximately a half a mile north and south—that area is completely covered with tracks, numerous tracks, dozens of tracks. We will have an aerial

picture to give you a better picture, an idea of just what that situation is out there.

Our evidence will further show that between 50 and 60,000 boxcars go through these particular yards in a [88] period of one month; that is, between 1,500 and 2,000 boxcars come and go through that yard every day; that, in addition, in order to handle those cars, to bring them in and to take them out of that yard, it requires several switches and movements of these particular cars in order to handle the same. Our evidence will show on that point that there are between 5 and 6,000 different switches made in that yard every 24 hours; that it is a beehive of activity; and that when you go to those yards, when you have been there five minutes, that anyone being there realizes one thing: you realize that activity, you hear the constant clanging of cars, the constant noise and the movement, and so on, that is taking place there.

The evidence we will produce will definitely show what the relationship of Addison Miller was with the Northern Pacific Railway. It will show that the ice plant at the place where the ice is manufactured and the tunnel and the dock were constructed during the period in the 1920's by the Addison Miller Company; that they operated it until January 1, 1937, as the owner of that particular ice plant and of that tunnel and the loading dock. We will show the contract relationship between Addison Miller and Northern Pacific since January 1, 1937 up until this accident occurred.

Our evidence will show that in 1937 the Northern Pacific took over the ice dock, the tunnel and the ice

plant, [89] and entered into a contract with Addison Miller as an independent contractor, agreeing that they would purchase ice for their cars from Addison Miller and would pay them a certain amount for this merchandise they were using, and that Addison Miller would manufacture the ice and convey it to the ice dock, put it in the cars, and so on, as an independent contractor; that they would hire their own employees, supervise their own employees, pay their own employees, and that they would be separate and distinct in every respect from the Northern Pacific Railway.

Further, we will show that the contract between Northern Pacific and Addison Miller covered the ice plant, the tunnel which we have referred to here, and the ice dock itself. We will further show that Track No. 13, which runs on the north side of the ice dock, and Track No. 12, which runs on the south side of the ice dock, were general purpose tracks for any and all use to which the Northern Pacific Railway decided that they should be put; that they were not exclusive ice tracks. Our evidence will show that through the years those tracks have been used for all purposes, just as any other of the switching tracks located in the Northern Pacific yards at Yardley or Parkwater, Washington.

Further, our evidence will show that the Addison Miller employees came to work through the ice plant, which is located on Sharp Avenue and which has a parking space [90] around it and which is not actually in the yard area itself; that through this tunnel there was this conveyor and also a walkway

by which the Addison Miller employees could go from the ice plant to the ice dock; that in crossing from the ice plant to the ice dock that the Addison Miller employees did not have to go or set foot on a single rail in that yard; and, further, our evidence will show that in the work which Addison Miller had contracted to do for Northern Pacific Railway, that one of the functions was the icing of cars and that that work was done up on a level as you have heard here, that this platform was about 15 feet above the ground; that that icing operation was carried on up on a level with this platform 15 feet above the ground.

Further, our evidence will show that there was no necessity at any time for any Addison Miller employee to be crossing Track No. 13 or any other track located in the Northern Pacific yards at Yardley.

The evidence will show just how this yard is operated out there. It will show what the communication system is between the Northern Pacific Railway-Addison Miller and vice versa. I will briefly outline a few of the important details, I think, on that particular phase.

It will show, ladies and gentlemen, that this yard office, that here the man in charge is the yardmaster, the Northern Pacific employee, the man that has charge and under [91] whose supervision and direction the movement of all of the cars in this particular yard goes through. It will show that also located at the yard office, that the Northern Pacific has what is known as an ice foreman, a man who is

notified in advance by telegram when ice cars or fruit trains are going to arrive in the Northern Pacific yards. We will show the instructions he receives as to what cars should be sent for icing, and so on and so forth, and, further, that what his procedure is, after being notified that a fruit train or even an individual car or two cars would arrive at the yard, that he would immediately contact the Addison Miller foreman, either by the phone between the yard office and the ice dock down here or by the regular Bell telephone system between the yard office and the Addison Miller ice plant, and that they would be notified at the time that cars requiring icing would arrive and when they would be put on either Track 12 or 13 for the icing operation. Further, that when that information arrived in the Northern Pacific office, that the yardmaster, through his series of helpers and other persons in different capacities there, would also know immediately of the time cars were to arrive and fruit trains were to arrive, and that when they did arrive, it was the yardmaster himself who would give the specific instruction to the switch crew as to what to do with the fruit train or the cars to be iced, say if there were one or two cars, and that then he [92] would give a hard list or an instruction to the switch crew and they would place the cars on the track.

Further, that the yardmaster knew at all times which cars were on Tracks 12 and 13. The one on 13, of course, is the one that runs north of the ice dock, and Track 12 is the track that runs south of the ice dock; that within his knowledge, our evi-

dence will show, that on this particular date he knew what cars were on those tracks at all times through that day. Further, that in addition to the communications between the yard office and the ice dock, that when a car was in for icing or if a train was in for icing when an actual icing operation was to be carried on, that blue lights located on the west end of the salt house would be put in place and would be illuminated, the lights would be turned on by the Addison Miller foreman, in order that there would be an additional precaution and a protection for anyone who was actually engaged in icing operations.

Further, our evidence, ladies and gentlemen, will show that on July 17, 1952, the day of this accident, at approximately 4 p.m. in the afternoon a fruit train consisting of 55 cars arrived at Yardley, Washington; that that fruit train was divided, part of the cars put on Track 12, part of the cars put on Track 13; that when that train arrived, the ice foreman notified the foreman of the Addison Miller of its coming, the yardmaster instructed the switch [93] crew to place the cars on 12 and 13, and that that icing operation was completed at 6:10 p.m.

Further, our evidence will show that after that icing operation was completed, the Addison Miller crew left the dock, the ice dock, went through the tunnel and went over to the ice plant where there are quarters set up for them to eat their lunches or meals while they are working, and during this period between 6:10 and 7 o'clock, that that fruit train was pulled off of Tracks 12 and 13, hooked

back together, and it left for the East at 7 p.m. that evening; that when the fruit train was taken off Tracks 12 and 13, it left Tracks 12 and 13 clear and there were no cars of any type on either one of those tracks.

Our evidence will then show that shortly before 8 o'clock, the switch train from Armour which makes what is called in railroad terms the "meat run," that is, the switch crew, the evidence will show, that takes cars of livestock to Armour's and Carsten's in the evening and returns empty stock cars from Armour's and Carsten's, it will show that approximately at 8 o'clock that evening that 9 C.B. & Q. single-deck empty stock cars were brought to the area where the yard office is located and the switchman was instructed by the yardmaster to put those 9 empty stock cars on Track 13 and that order was followed out. The proof will show that at the time those 9 cars were put on Track 13, that [94] there were no other cars on Track 13; that there had been nothing there between the time the fruit train was taken off and when these 9 empty cattle cars were put on Track 13 just before 8 o'clock; further, that the Addison Miller crew completed their lunch period and returned to the ice dock; that they were under the supervision of a man by the name of Mr. Fincher, who I believe was the foreman in charge of the crew, the Addison Miller crew that night, and that when the crew and Mr. Fincher arrived at the ice dock, that at that time five members of the crew, Mr. Stintzi, Mr. Maine, Mr. Tarnowski, Mr. Vallarano and Mr. Johnson,

were designated by Mr. Fincher to remove this chipped ice from this area which is designated on Defendant's Exhibit No. 1 where the conveyor chain makes the turn from going north and goes to the east.

Our evidence will show that at that particular location below this conveyor chain, that sometimes chips of ice come off and accumulate at that area; that the area where they accumulate is the same general area or level as what the tunnel itself is at this location, and that while this crew went down when they came back, they were carrying out this operation.

I believe the evidence will show that Mr. Fincher said to dump that ice across Track 13; that the Stintzi boy and the Maine boy were carrying this bucketful of chipped ice which the other members of this particular crew had put in the [95] buckets inside of the area there, were carrying that out through the door, and that at that time these 9 C. B. & Q. cattle cars, empty cattle cars, were sitting on the track. The evidence will show that at that time seven cars were to the west of the location where the boys were coming out of the door and that there was a car directly in front of them and possibly another to the east of the location where they were coming out with this bucket of slush ice, and that in carrying out the operation, just as Mr. Etter has told you, I will not go into detail on that, he said that that they were at that time passing this bucket back and forth between where two of the stock cars came together under

the couplings of those cars, and that while carrying out the operation at that location, crawling under the couplings of these cars, the yardmaster up at the location here as shown on Defendant's Exhibit No. 1 gave an instruction to Switch Foreman Prophet to pick up 14 cars on Track No. 43, which would be up in this area, and bring the cars down and switch them in on Track 13.

The evidence will show how that switch crew went over, picked up those cars, what they could see of the rest of the yard while they did so, how they went back to the main, which was necessary to come to in order to get on to the proper track to switch those on No. 13.

Our evidence will show at the time the yardmaster [96] gave that instruction to that switch crew, that he knew that there were only 9 empty stock cars sitting on Track 13; that there were no refrigerator cars on Track 13 upon which any Addison Miller man could be doing any work at that time; that there were no other cars on Track 13 which anyone or any employee of Addison Miller would be loading on anything; that Track 13 at that time was being used by the Northern Pacific Railroad for the making up of a train which was going to leave and go East; that they were going to use Track 13 to make up this train, which had been their general purpose and custom ever since they have operated this yard at Yardley or Parkwater, Washington, to use Track 13 for any purpose whatsoever at any time; that it was not an exclusive ice track; and, further, that at that time he had

received no information, no phone call, from the foreman or anyone in charge, anyone whatsoever, at Addison Miller and at the dock itself, nor had he received any phone call or any notification whatsoever from any Addison Miller foreman or employee from the ice plant that any Addison Miller employee was engaged in any work on, about or around any tracks of the Northern Pacific Railroad, particularly Track No. 13.

The evidence and proof will show that the switch crew, when they came back up from picking up the 14 cars that they had been instructed to put in on Track 13, as they came back they lined up, the Switch Foreman Prophet lined up [97] Switch No. 13, opened the switch in order that the cars as they went to the west, they could be switched back on to Track 13 to the east, and at that time that he left a switchman by the name of Craig located at Track 13, and at that time neither the switch foreman, switchman or the other man who subsequently uncoupled the 14 cars in question, saw any blue lights whatsoever on the ice dock indicating or giving any reason to anticipate that anyone would be on or about the tracks located in the area of the icing dock, let alone that anyone would be crawling under the couplings of the cars at that location; that as the movement was carried out, the 14 cars were uncoupled in the area up around here, that they were sent on down the main and went across the Switch 13 and proceeded on down Track 13.

Our evidence will show that the operation of

shunting of cars, the movement of cars in that particular fashion, is an ordinary and customary practice that occurs and takes place in these switch yards thousands of times every day. Our evidence will show that no one could be in those yards for a period of over 5, 10, 15 minutes without observing that situation on various tracks and locations in those yards.

Further, ladies and gentlemen, our evidence will show that at the time that this accident occurred, there were no facts, no information, which the Northern Pacific man in [98] charge had or could have had which would have caused him any reason to anticipate that anyone was crawling beneath any cars in the area of this ice dock. Further, the evidence in general will show that at no time had the Northern Pacific Railroad been advised or had ever known that anyone crawled between standing freight cars at this location, and the evidence will further show that at no time had the Northern Pacific Railroad given any permission, either express or otherwise, to use any area other than what was given them under the contract which began and went into effect on July 1, 1937.

The evidence will further show that the area between Track 13 and Track 14 was an area that was used for dumping, the area along there; that the Northern Pacific Railroad would bring in dirty cars of all types and that they would clean the refuse from the cars, dump it in this particular area and burn the same. The evidence will further show that the crew taking out this slush or chipped

ice had ample space to dump that on the south side of Track 13 without ever setting forth one foot or ever touching Track 13 itself. It will show, ladies and gentlemen, to the west that it was a very short distance, as is shown on the Defendant's Exhibit No. 1, to an area where the ice and slush ice could have been dumped; that in this operation of cleaning out this pit sometimes doesn't occur once a month, once in two months. In [99] some seasons, the busier seasons, the evidence will show, possibly it occurs twice a month. The evidence will show that it is not a daily activity or something that is done constantly. It will show the amount that was taken out; that the small amount taken out could have been dumped south of Track 13, either to the west between this building designated as the tunnel shed here and the coal shed or over to the west of that particular area; or that by going to the east, that they would come under this icing platform which is 15 feet in the air, set up on pilings, and for a distance of 300 feet or more to the east there is nothing under that platform.

Now, ladies and gentlemen, we say, and say in all sincerity, that the Stintzi boy did sustain a serious injury. Everyone connected with the Northern Pacific is sorry that accident occurred, sorry that injury occurred.

As I say, ladies and gentlemen, when we have produced the witnesses that will testify to the facts which I have briefly related to you at this time, I believe that we can come before you at that time and honestly say and show you that this accident

was not caused by any negligence of the Northern Pacific Railroad.

Thank you very much.

The Court: We will take a recess before proceeding. Court will recess for 10 minutes. [100]

(Whereupon, a short recess was taken.)

The Court: All right, proceed.

Mr. Etter: Call Gerry Stintzi.

GERALD STINTZI

called and sworn as a witness on his own behalf, testified as follows:

Direct Examination

Q. (By Mr. Etter): You are Gerald Stintzi?

A. Yes.

Q. Call you Gerry, don't they? A. Yes.

Q. Everyone calls you Gerry. Where do you live, Gerald? A. 420 East Olympic.

Q. Another thing I am going to ask you to do is speak out good and loud, because the acoustics are a little difficult in here and all these people on the jury, besides counsel and the Judge, have to hear what you have to say. A. Yes.

Q. You live at East 420 Olympic, Gerry?

A. That is correct.

Q. And who else lives there with you in your family? [101]

A. My mother and by brother and little sister.

Q. And your brother, how old is your brother?

A. 14.

Q. And your sister? A. 10.

(Testimony of Gerald Stintzi.)

Q. And how old are you now, Gerry?

A. 19.

Q. And when this accident occurred on the 17th of July of '52, you were 17?

A. That is correct.

Q. You were 17 then. Now how long have you lived here in Spokane, Gerald?

A. Oh, 15, 17 years, around there.

Q. Around there. And you went to grade school here? A. Yes.

Q. Where did you go to grade school?

A. I started at Opportunity, Dishman, then I went to St. Xavier's and then Hamilton.

Q. And then Hamilton? A. Yes.

Q. You finished the 8th grade at Hamilton, did you? A. That is correct.

Q. And entered Rogers High School?

A. That is correct.

Q. And what year were you in at the time this accident [102] occurred?

A. I was a sophomore. It was in 1952.

Q. You were a sophomore?

A. That is correct.

Q. Did you participate, can you tell us, in athletics when you were in grade school, Gerry?

A. Yes.

Q. And when did you become most interested in athletic work?

A. All my life I have been.

Q. When in grade school, however?

(Testimony of Gerald Stintzi.)

A. Well, I started to really practice in the 7th grade.

Q. And did you continue that, then, through the 8th grade? A. Yes.

Q. What particular sports, Gerry, did you like and were you quite proficient in?

A. Track and football.

Q. Track and football. And in track, what was it that you did?

A. I ran the mile and did some broad jumping, and when I was in grade school I ran relay and sprints.

Q. Relay and sprints. And you were doing that, you were putting emphasis, were you, on that as a grade school student?

A. Yes, my most emphasis was on distance running. [103]

Q. Did you continue that as a freshman when you got to Rogers High School? A. Oh, yes.

Q. Both in your freshman and your sophomore years? A. Oh, yes.

Q. Prior to the time that this accident occurred, Gerald, had you worked for Addison Miller?

A. Yes.

Q. And what type of work had you done?

A. I worked in the icing house, chipping ice, where they make it, and I worked up on the dock with salting cars and icing cars, and then down below taking salt from the cars into the salt pit.

Q. I see. And you started to work there, did you, in this year, that is, in '52? Can you tell us about

(Testimony of Gerald Stintzi.)

when it was you started working there before the accident occurred on the 17th?

A. It was approximately five days before I got hurt.

Q. Approximately five days before you got hurt?

A. Yes.

Q. Now you are acquainted, Gerry, with Allan Maine, are you? A. Oh, yes.

Q. Is he a schoolmate of yours at Rogers?

A. Yes. [104]

Q. And he was at the time that you were working for Addison Miller? A. Yes.

Q. Is that correct. And prior to the 17th of July while you were working for Addison Miller, had you done these various jobs that you have told us about; in other words, chipped ice and worked in the salt shed and one thing and another?

A. I did everything I mentioned except work in the ice house where they made the ice.

Q. You did everything except work in the ice house? A. Yes.

Q. And those five days, I assume that you had been doing that type of work, is that so?

A. That is so.

Q. What shifts were being used there at Addison Miller, Gerald, on the 17th?

A. There was the day shift and the night shift and the swing shift.

Q. Now you mean by the day shift which shift?

A. That was—oh, let's see—well, it was 8 hours before 3 o'clock, it was early in the morning.

(Testimony of Gerald Stintzi.)

Q. In other words, it was 7 to 3?

A. Yes, 7 to 3 and 3 to 11 and from 11 until the morning shift again. [105]

Q. Can't hear back here?

A. Okay. It was from 8 to 11.

Q. 3 to 11?

A. Or 3 to 11, then from 11 to the morning shift, and then from the morning shift——

Q. On again to the afternoon or swing shift at 3? A. That is correct.

Q. In other words, there were three shifts around the clock? A. That is correct.

Q. On the night of the 17th, the shift that you were working was which one? A. The swing.

Q. The swing shift? A. That is correct.

Q. And you had gone to work that day at what time? A. 3 o'clock.

Q. At 3 o'clock? A. Correct.

Q. All right, when you came to work at 3 o'clock, can you tell us about how many men were working on that crew, that is, generally on that shift, I should say, for Addison Miller in that area?

A. Oh, there was quite a few, maybe 20, 25. There was quite a few, I never counted them.

Q. Would you estimate it somewhere between 20 and 25? [106] A. Approximately.

Q. Approximately, I mean, I am not trying to get it exact. But that is about the size of the crew?

A. That is.

Q. And at 3 o'clock, starting at 3 o'clock, can

(Testimony of Gerald Stintzi.)

you tell us, were you directed to do any particular type of work when you first came on shift?

A. No, we usually iced cars, go up to the dock and chop down the ice first so we could bring the ice on to these pulleys, then put the ice in and chop it down, then close the lids.

Q. I see. Now during the course of the fore part of this trial you saw this large chart that was set up here, Gerry? A. I did.

Q. And you were referring to the ice dock, is that the ice dock that is indicated on that chart?

A. Yes, with the lights, the one that is up in the air.

Q. With the lights? A. Yes.

Q. You say that you had been doing the general duties associated with icing cars, is that correct?

A. That is correct.

Q. Up until about what time?

A. From 3 until 11. Sometimes we worked overtime if the [107] crew had had more cars than it could handle.

Q. What I am getting at now, on the 17th you started to work on cars at 3 o'clock, is that right?

A. Yes, we worked on cars.

Q. And how long did you work before you went to lunch, do you recall?

A. No, I don't recall.

Q. Do you recall what time it was that you took lunch that night?

A. We, we just finished. There is all different intervals. We just finish, when we have our work

(Testimony of Gerald Stintzi.)

done, a car that comes in, a string of boxcars, and then we go to lunch.

Q. I see. Do you recall, have you any idea, about approximately what time it was that night?

A. No.

Q. In other words, between 3 and 7, what time it was, somewhere between that that you went to lunch?

A. No, I wasn't paying any attention to time.

Q. You didn't pay much attention to the time. Who did you have lunch with that night?

A. Pardon?

Q. Did you have lunch with one of the men on your crew or any of the men on your crew that night?

A. Allan Maine and I, we had lunch.

Q. You and Allan Maine had lunch together?

A. Yes.

Q. I see. Do you know "Idaho" Davis?

A. Yes.

Q. Was "Idaho" working on the crew that night? A. Yes.

Q. I mean, he was in the group that was working, the 20 or 25 that you have referred to?

A. Yes.

Q. And Joe Vallarano, do you also know Joe?

A. Not personally but just out at the job.

Q. But you know who he is?

A. Oh, yes.

Q. And was he working in that crew that night with you? A. Yes.

(Testimony of Gerald Stintzi.)

Q. He was. But you had lunch, you say, with Allan Maine?

A. That is correct, with some others.

Q. Do you recall about what time it was that you got back to the Addison Miller dock or, that is, the building where they were doing the icing, where they bring the ice up? Do you remember what time it was you got back there after you had lunch?

A. No, I don't, I didn't pay any attention to time.

Q. All right, will you tell us what occurred after you got back from lunch? Where did you go?

A. Well, after lunch we might have iced some cars, which I [109] don't remember, it is quite awhile back.

Q. You don't remember that?

A. No, we might have.

Q. All right.

A. And then from there we were up on the dock and Fincher started choosing——

Q. Just a minute. You were up on the dock?

A. Yes, that is correct.

Q. You mean you were up on the raised dock that has been described as being about 15 feet above the level of the tracks? A. That is correct.

Q. All right, you go ahead now, tell us.

A. And then we were standing around and then Fincher——

Q. Who is Mr. Fincher?

A. The foreman.

(Testimony of Gerald Stintzi.)

Q. What foreman? Whose foreman?

A. Our foreman.

Q. I mean, who employs him?

A. Addison Miller, I think.

Q. All right, now, you tell us what happened then.

A. He told me to choose a crew to go down and clean the ice slush from underneath the pulley belts, under the belts.

Q. All right, what did you do then? [110]

A. Then I started choosing my crew, and then he said to go down, take the slush——

Mr. Cashatt: I object to any conversations between the foreman of Addison Miller and this witness, your Honor.

Mr. Etter: I am asking for the instructions he was given.

The Court: I think he is entitled to show instructions he had. I will overrule the objection to that extent.

Q. (By Mr. Etter): Gerry, if it is conversation, don't talk about that, but did Mr. Fincher, the foreman, give you some instructions?

A. Yes.

Q. What were they?

A. To go down, take the slush out and go across the track and empty it.

Q. And empty it? A. That is correct.

Q. And did he tell just you to do that?

A. Well, in general the crew that he chose.

Q. I see. And who composed that crew?

(Testimony of Gerald Stintzi.)

A. It was Vallarano, Al Maine, me, and there —I can't remember the other parts of the crew.

Q. There was one other man from Canada, wasn't there?

A. I believe so, I'm not really sure.

Q. But there were you and Al Maine and Joe Vallarano? [111] A. That is correct.

Q. Do you remember this fellow by the name of Tarnaski that was from Canada?

A. I may have said a couple of words to him, but I really don't know him.

Q. No, but I mean do you remember him as being in the crew? A. No, I don't.

Q. John Tarnaski, a fellow from Canada?

A. No, I don't.

Q. All right, then, what did you fellows do, that is, you and Al Maine and Joe Vallarano and whoever might have been with you? What did you do?

A. We went downstairs and then in a discussion we chose parts where we would work.

Q. All right. What did you start doing first?

A. We took the bucket, Al Maine and me we took the bucket, and we waited for them to fill it up down in the slush pit and then Vallarano would hand it to Al and me, and then from there——

The Court: I have no way of stopping these planes. I suppose we just better wait until they fly over.

All right, you may proceed.

Q. (By Mr. Etter): Now when you were told

(Testimony of Gerald Stintzi.)

to dump this ice across the track, what track was that, was it designated? [112]

A. Well, there is only one track alongside there. We didn't know the numbers or anything.

Q. I mean to the north or south?

A. To the north.

Q. To the north. And you were told to take it across that track, is that correct?

A. That is correct.

Q. Would that be Track 13 that was pointed out as being the first track north here (indicating on Exhibit 1)? A. That is correct.

Q. The one north of the ice house on Exhibit 1 on which the red line is drawn, the first one north of the ice house? A. Yes.

Q. Beg your pardon? A. Yes.

Q. Yes. And you say that these buckets were filled up with this slush ice?

A. That is correct.

Q. All right, what sized bucket was that, Gerry?

A. I couldn't give the measurement, but it was big enough for both Al and me to really have trouble carrying it.

Q. You say it was filled up with slush and then you took ahold of it, is that it?

A. That is correct.

Q. All right, then what did you do with it, you and Al? [113]

A. Al and me took it side by side, we carried it up through this flight of stairs to the outside, and then we walked—let's see—a little to the west

(Testimony of Gerald Stintzi.)

and we came to the couplings, and then from there I went under the couplings and he gave it a boost to the middle of the coupling, and then from there I took it with a big boost maybe one or two steps and dumped it.

Q. Let me ask you this: how far to the west was the first opening by the coupling where you went through, do you recall?

A. I wouldn't give any exact, but around 10 feet.

Q. 10 feet or so. That would be west of the door that you came out, wouldn't it?

A. Yes.

Q. Toward the yardmaster's office?

A. Yes.

Q. Now those cars, those railroad cars, are about 40 feet long, generally, aren't they?

A. I wouldn't know.

Q. I know, but that was your closest opening, I gather? A. Oh, yes.

Q. I see.

The Clerk: Your Honor, I have marked Plaintiff's 2 through 15 for identification.

Q. (By Mr. Etter): Now, Gerald, for the purpose of [114] identification, I am going to ask you if you recognize the Plaintiff's Exhibit No. 2 for identification?

A. That looks like the tunnel, the tunnel.

Q. The tunnel? Which tunnel is that?

A. That is leading out to the—well, what would they call it?

(Testimony of Gerald Stintzi.)

Q. The ice-making house? A. Yes.

Q. I see. Is that the tunnel that was described on the Defendant's Exhibit 1 as coming over into the Addison Miller shack? A. Yes.

Q. And Plaintiff's No. 3, you recognize that?

A. Yes.

Q. And what is that?

A. That is going out to the big dock, the high dock, from where they make ice.

Q. I see. Is it another picture, a close-up, of what is indicated in Identification 2?

A. Yes, it is the same tunnel.

Q. All right. And that is the tunnel that is described on the chart, is it, Gerry, as coming over from the ice house, which appears at the southern part of the chart, and goes across on to the ice house? A. That is correct. [115]

Q. Now showing you the Plaintiff's Exhibit No. 4 for identification, Gerald, can you tell me what that No. 4 is?

A. That is just going right up to the high dock up there where we ice cars, that is going right up there.

Q. And what is shown besides just the stairs and going up there? Is the chain there?

A. Yes, and the slush there.

Q. I see, all right. And Plaintiff's 5 for identification, Gerald?

A. That is where we took the slush from, that is of the slush pit.

Q. Is that the sump? A. Yes.

(Testimony of Gerald Stintzi.)

Q. So-called. I might ask you, is that also shown in Identification 4? A. Yes.

Q. I see. And is a close-up?

A. Yes.

Q. Plaintiff's No. 6 for identification?

A. That is going up to the big dock and the chain where we took the ice from.

Q. I see. Is that a continuation and a view up above of the sump which is in 5 that you just identified? A. Yes, that is correct.

Q. You speak right up, don't whisper to me up here. See, [116] they want to hear you back here, Gerry.

No. 7 for identification, can you tell us what that is?

A. That is where we came right out to go across the track from where we were taking slush.

Q. I mean, is that the opening to the room where you were getting the slush?

A. That is correct.

Q. I see. That is No. 7. Now No. 8?

A. That is the house we come right out of, right up after we get to the top of the dock.

Q. I see.

A. Where we iced cars.

Q. I see. That is as you get to the top of the dock, is that correct? A. Yes.

Q. Is that looking west?

A. That is looking west.

Q. That is looking west. All right. And No. 9 for identification?

(Testimony of Gerald Stintzi.)

A. That is looking east on the docks where we took the ice and put it on to boxcars.

Q. I see. Now as to Identification No. 8, is No. 9 a view from that doorway looking east?

A. That is correct. [117]

Q. That is correct. Along the dock or the ice dock? A. That is correct.

Q. All right. Now 10, Gerald, for identification, can you tell me what that is?

A. That is the rail we went across, and that picture there, we are looking west—I mean, looking east.

Q. All right, along the dock? A. Yes.

Q. All right. No. 11 for identification?

A. That is looking east.

Q. That is looking east?

A. Yes, that is another picture of the rail.

Q. And it is a similar picture to No. 10, is it not? A. That is correct.

Q. Taken from a shorter distance back?

A. Correct.

Q. Along the same direction, east?

A. Correct.

Q. No, 12 for identification, Gerald?

A. That is the same rail, looking west.

Q. This is looking west where the others were east, is that correct? A. That is correct.

Q. Looking west, which on the Defendant's exhibit would be down toward the yardmaster's office where the switching [118] movements are made?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Is that correct? A. That is correct.

Q. All right. And No. 13?

A. That is looking west, the same rail looking west.

Q. It is looking west, another view of the same scene as is indicated in the Identification No. 12?

A. That is correct.

Q. That I just handed you?

A. That is correct.

Q. Now No. 14 for identification?

A. That is looking east on the same rail that we went across.

Q. That is looking east, is it not?

A. That is correct.

Q. Down toward this particular shed that appears in 12 and 13? A. That is correct.

Q. And No. 15?

A. That is looking east, that is the same rail, that is a long view.

Q. That is also looking east? A. Yes.

Q. Is that correct? [119]

A. That is correct.

Q. All right. Now, No. 16 for identification, Gerald?

A. That is a picture where we came out of and the rail next to it, the north rail.

Q. I see. Is that a picture of the dock and the salt house? A. That is correct.

Q. In two sections, is it not?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Two sections put together. Do you recognize it? A. Yes.

Mr. Cashatt: Your Honor, may we take a minute to look at these pictures?

The Court: All right.

Mr. Cashatt: May I ask, counsel, when these pictures were taken?

Mr. MacGillivray: I think probably in August, sometime in August, 1952.

Mr. Cashatt: '52.

Mr. MacGillivray: As close as I can get it, about August the 9th, approximately August 9, 1952, Exhibits 2 to 15 were taken. Exhibit 16 was taken——

Mr. Etter: Last Friday night.

Mr. MacGillivray: Thursday night.

Mr. Cashatt: No objections, your Honor, to Exhibits [120] 2 to 15. Those were the ones that were offered.

The Court: Yes. They will be admitted, then. I am not sure whether you offered 16 or not.

Mr. Etter: Yes, I am offering 16, too, at this time, your Honor. That was taken last Thursday.

(Whereupon, the said photographs were admitted in evidence as Plaintiff's Exhibits 2 to 15, inclusive.)

Q. (By Mr. Etter): As to 16, Gerald, you will note that it is broken in the middle there. There are two pictures here pasted together, are there not, with a piece of scotch tape?

A. That is correct.

Q. Now the designated east and west, the track

(Testimony of Gerald Stintzi.)

appears to be going off at about a 30 degree angle or so there and there is a corner on this building. Now is there a corner on the building or not?

A. No.

Q. This building is straight through, is it not?

A. That is correct.

Q. And if it is folded, the west part indicates half of the building, isn't that correct? [121]

A. That is correct.

Q. And if you turn it over this way, as designated by the east, it indicates the other half?

A. That is correct.

Q. And, actually, the railroad track outside of it would have to be viewed as a straight-line track, rather than showing the crook in it by reason of having to take half of the picture with one focus and half of the picture with the other focus?

A. That is correct.

Q. In other words, the actual representation of it in order to get it would have to be by folding it and looking at one half one time and turning it over and looking at the other half to get the continuation of the dock? A. That is correct.

Q. That is correct. There are no corners to the building, it is all one complete building along the same line of track? A. It is straight.

Q. It is straight.

Mr. Etter: Any other questions, Leo?

Mr. Cashatt: No objection.

The Court: Well, with that explanation, it will be admitted. [122]

(Testimony of Gerald Stintzi.)

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 16.)

Q. (By Mr. Etter): Now, Gerald, at the time when you were icing a car, when you iced a car, will you tell us the operation of icing a car from the time the ice comes along that chain belt until it is taken upstairs and put in the top of the freight car? Just tell us in brief how that is done.

A. The ice comes along in a great big chunk, along this belt affair, chain affair, and somebody is elected to push it off on to the side at certain points where it should be iced. Then it is chopped and then——

Q. Well, now, just a moment. First, it comes along on this chain belt, does it not?

A. That is correct.

Q. All right. Tell me, does the chain belt take it in an upward direction to the top of the ice house? A. That is correct.

Q. On to the ice dock?

A. That is correct.

Q. All right, and then what happens?

A. Then it goes straight along the top of the dock. [123]

Q. All right.

A. And it carries the ice and, like I said, then at certain parts they push it off the chain to where we are going to ice.

Q. All right, they pull it off the chain on to the dock? A. That is correct.

(Testimony of Gerald Stintzi.)

Q. All right, they get it on the dock, what do they do then?

A. Then they cut it in half, then we give it a great big shove, we have the lids open to the boxcars, and it is chopped down first.

Q. Do you slide it across a plank or a runway from the dock on to the top of the boxcar?

A. Yes, there is a little plank they carry.

Q. All right, and it is slid across on to the top of the boxcar? A. That is correct.

Q. All right, when it gets to the top of one of the boxcars, then there are men that work on top of the boxcars? A. That is correct.

Mr. Cashatt: Just a minute. I believe that these are refrigerator cars.

Mr. Etter: Yes, refrigerator cars, that's correct.

Q. They slide it across the top of these refrigerator cars and there are men on top of them, is that correct? [124] A. That is correct.

Q. All right, when it gets over there, what happens to it and what is done to it, that is, this piece of ice?

A. Then there is a person over the top of the hole where it goes down into the car, he takes his pick and pushes it down in there and chop it up fine and then puts salt on top, throws a lid on top, and then goes to the next car.

Q. All right, now, this chopping, how is that done? A. Upward and downward.

Q. With a pick, you say? Is it kind——

A. It is an iron bar with prongs on the end.

(Testimony of Gerald Stintzi.)

Q. Prongs on the end of it? A. Yes, sir.

Q. And just one chunk of ice used or numerous chunks of ice used? A. Oh, numerous chunks.

Q. I see. And you say when the ice is chopped up, is it then salted?

A. Yes, some cars are salted and some aren't.

Q. Some are and some are not, is that correct?

A. That is correct.

Q. And when there is enough of it chopped up and it is salted, then the car is considered iced, is that the idea? [125] A. That is correct.

Q. All right. Is there a top they pull down on it then? A. Yes, with a lever.

Q. I see. And how many men ordinarily are out on top of that refrigerator car chopping away when you are icing one?

A. Oh, it depends. Sometimes there is two on each end. Mostly there is two on each end of a boxcar.

Q. I see. And do they ice more than one car at a time; in other words, do they work on a string of them sometimes? A. That is correct.

Q. And this conveyor belt that you are talking about, does it extend down the whole length of the icing dock? A. Yes, clear down to the end.

Q. In Exhibit No. 9, is that the conveyor belt that is indicated in the middle of the dock?

A. That is correct.

Q. Running way down to the end?

A. That is correct.

Q. That is correct. And ice is taken along that

(Testimony of Gerald Stintzi.)

conveyor belt and cars are iced all the way along that dock? A. That is correct.

Q. Now do you recall when you were carrying the ice, that is, the slush ice out with Allan Maine, do you recall [126] how many cars there were or how many freight cars or any kind of railroad cars there were on Track 13, which was just north of the dock?

A. There was quite a few to the west.

Q. Quite a few? A. Yes.

Q. And how about to the east?

A. You couldn't see only so far because there were men working back and forth taking salt off——

Mr. Cashatt: I object to that and move it be stricken, your Honor. There is no contention here that there was any work going on on those tracks over there.

Mr. Etter: What do you mean contention? He is just describing what was going on.

The Court: He is describing what he saw and could see. I will let it stand.

A. To our right or east of us there were men going from a boxcar back and forth taking salt from the boxcar into the pit.

Q. (By Mr. Etter): All right. And what was the situation in the other direction?

A. I took a glance down there and all I could see was a real long string of cars.

Q. In other words, the string of cars was to the

(Testimony of Gerald Stintzi.)

west and the working operation you saw was to the east, is that correct? [127]

A. That is correct.

Q. All right. And you say the longest string of cars was to the west, that is, toward the yardmaster's office? A. That is correct.

Q. All right. And could you tell how many cars were up to the east?

A. I couldn't see past where they were working.

Q. I see. And that was at the salt dock?

A. That is correct.

Q. Salt house there?

A. That is where they put salt.

Q. All right. Now that is when you and Allan Maine were emptying the buckets, is that correct?

A. That is correct.

Q. And at the time that you were emptying them, is that correct, is that so?

A. That is correct.

Q. All right. Now after you and Allan would get a bucketful of ice, slush ice, will you tell us how you handled it and what you did with it?

A. We took it from Vallarano, we went upstairs and outside, then we went a little——

Q. Well, now, take it easy. Did you both have ahold of it?

A. Yes, we both had ahold of it, side by side.

Q. All right.

A. Then we went up this flight of stairs, turned to our left and then we were outside. Then we went to the west a little bit——

(Testimony of Gerald Stintzi.)

Q. To the east, you mean?

A. To the east——

Mr. MacGillivray: To the west.

Mr. Etter: To the west, all right.

A. To the west a little bit.

Q. All right.

A. To where the couplings were the closest to us, space. Then I would go under the coupling and Al would scoot the bucket to me halfway, help it, then from there I would give it a boost across the rest of the part of the track and walk one or two steps and then dump it, and then go right back underneath like we started.

Q. All right, did Al come through under the coupler with you to pull the ice bucket over?

A. No, he gave one great big shove so I could handle it enough when I went under.

Q. I see. Would you both swing it under first, is that the idea, you both stand and swing it under as far as you could first? A. Yes.

Q. All right, then you would go through? [129]

A. That is correct.

Q. All right, and after you got through, then what would you do again?

A. Then I would grab the bucket and give a great big toss and go about one or two quick steps and then empty it.

Q. And that, of course, was north of the track, north of Track 13? A. That is correct.

Q. Track 14 was just beyond further to the north? A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Now tell me where you were dumping it, what was the situation where you were dumping, tell us what it looked like?

A. Oh, it was a great big gulley where paper bags of salt and other things were laying there.

Q. All right, were there a lot of these sacks and debris lying there? A. That is correct.

Q. And was it just in that area or did it extend east and west?

A. I never looked down east or west.

Q. Well, handing you Plaintiff's Exhibit No. 10, does that represent the condition that you saw there? A. Yes.

Q. To the north? [130] A. That is correct.

Q. Was that the general condition?

A. Yes.

Q. And in Plaintiff's Exhibit No. 11?

A. That is correct.

Q. And likewise in this particular exhibit, No. 12, which is looking west, is that the way the area appeared to you? A. That is correct.

Q. That is correct. Now in this operation of carrying this slush ice over, did only you and Allan Maine participate in that, or was there somebody else doing that work along with you?

A. Well, once we traded off with Vallarano.

Q. I see. Once or more than once, do you remember? A. I don't remember.

Q. I see. And who was it that traded off, did you trade off or did Allan trade off that you recall?

A. I traded off.

(Testimony of Gerald Stintzi.)

Q. You did. Do you remember, Gerry, from the time you started with Allan and Joe Vallarano in this operation of carrying this slush ice out, do you remember how many trips you made before this accident occurred?

A. I would have to say approximately.

Q. All right, approximately? [131]

A. 8 or 9.

Q. 8 or 9. Do you remember how long it took to fill up this bucket? Was it a 5-gallon bucket, did you say?

A. I don't know how big it was, but it was a big one.

Q. It was a large bucket?

A. That is correct.

Q. And how long did one of these trips usually take, that is, to fill the bucket, carry it up the stairs and take it over the track, under the coupler and dump it and bring it back, do you recall?

A. Oh, it would have to be very approximately, about 5 or 6 minutes.

Q. Possibly that. That is your best recollection?

A. Yes.

Q. And you had made, you say, about 8 or 9 or possibly more? A. Approximately.

Q. Now what was the condition as to the illuminating lights that are up on top of the dock at around 8:15 or thereabouts that night?

A. All I know, when it started getting dusk, the lights on the dock would turn on.

Q. The lights were turned on?

(Testimony of Gerald Stintzi.)

A. They would be turned on.

Q. Well, they were turned on, were they?

A. I never noticed. [132]

Q. I see. All right, could you see, were you able to see? A. Yes.

Q. You were able to see. All right, do you know how many lights there are up there?

A. No, I don't.

Q. Do you know the distance of that dock running from west to east? A. No, I don't.

Q. You do not. Do you recall the last bucket that you and Al Maine unloaded, do you recall that time?

A. Yes.

Q. All right. Will you tell us in your own words just what occurred when you brought the empty bucket back and handed it to Al Maine, where you were standing and all of the details?

A. All right. I—we were going across the track and—let's see—Al Maine was swinging me the bucket, and all of a sudden there was a great big crash. I had my hand over so I could support it to pull it over. There was a big crash and then I let out a scream and then it started dragging me east, and I just bounced up and down until I come to the part where I was helped, part pulled and part drug out. And then I laid there and then some people started coming around and wanted my name and address, and then I started praying. [133]

Q. From the time that you started to take this slush ice out of the pit along with Allan Maine and carry it across the track, Gerry, from the time you

(Testimony of Gerald Stintzi.)

started and until the time you were hurt, did you ever see the foreman, Fincher, around?

A. No, the only time was up on the dock when he give some instructions.

Q. When he gave you the instructions. Between the time that you were given your instructions on cleaning this ice up and the time that you were injured, did you have any occasion to talk with Mr. Fincher? A. I had none.

Q. Or do you recall that Mr. Fincher talked with you?

A. No. The last time was up on the dock.

Q. And you had no further conversation with him? A. No, none whatsoever.

Q. Or no further instructions?

A. None whatsoever.

Q. And at the time you were upon the dock, what instruction did he give you on disposing of that ice?

A. He just said, what I can remember, he may have said other words but I don't recollect, he said, "Go across the track and take the slush and dump it."

Q. And dump it? A. That is correct.

Q. All right. Were you given any other instruction than that?

A. That was all. Maybe a little instructions about taking the slush out, about where the belt is, and that's all.

Q. That's all. And that was the last and only in-

(Testimony of Gerald Stintzi.)

struction, I assume, that you had between that time and your 8th, 9th, or 10th trip, whatever it was, when you were injured? A. That is correct.

Q. Now in carrying this bucket, that is, you and Allan Maine, in carrying this bucket out the door for the purpose of taking it north to the track, was there any other way you could dump it over where you were dumping it, that is, north of the track, than under the coupler? Was there any other way?

A. No, we could have maybe walked down a couple of boxcars extra and then went under the couplings.

Q. Well, how many boxcars would you have had to walk down toward the west?

A. Quite a few, as far as my eyes could see.

Q. I see. And how about down toward the east?

A. Well, there were men working back and forth taking salt off the boxcar.

Q. I see. And you went underneath the coupler, is that right? [135] A. That is correct.

Q. In accord with the instructions as you understood them? A. Yes, that is correct.

Q. I see. Now after you say that you heard this crash—was it a crash, Gerry?

A. Yes, it was the loudest crash I have ever heard.

Q. All right. Tell me, were you facing the oncoming car or was your back to the oncoming car?

A. My back was to the oncoming car as I was looking east.

Q. You were looking east, this way?

(Testimony of Gerald Stintzi.)

A. That is correct.

Q. And had your leg this way (indicating), is that the idea? A. That is correct.

Q. And it came this way? A. Yes.

Q. All right. And it was your right leg?

A. That is correct.

Q. Have you any idea how far this movement of the train carried you and thumped you along the track, Gerry?

A. I couldn't remember, I was too busy screaming and hollering.

Q. I see. And do you remember or recall it passing over any other part of your arm or body?

A. It just felt like my arms and my legs were just taken [136] off, they were just going over everywhere.

Q. Tell me this, were you dragged or did you roll, can you recall?

A. It dragged me, it just drug me along. It took the leg, I don't know why it didn't roll over it, it just drug me along.

Q. Along that distance?

A. That is correct.

Q. All right, and were you finally off the side of the track or did the movement of the train stop?

A. Oh, it kept on going.

Q. I see. And you were there at the side, is that correct? A. That is correct.

Q. And did you suffer rather extreme pain, Gerry? A. I couldn't describe it.

Q. Did you know that you had lost your leg?

(Testimony of Gerald Stintzi.)

A. I knew then.

Q. You knew then? A. I knew then.

Q. Could you tell the jury what it felt like, if you can?

A. Something like somebody with a blow torch going across.

Q. And did you have that same feeling in your arms? A. Yes.

Q. You did. Did you lose conciousness?

A. In intervals I would lose it. The pain would hit me, [137] certain part, and I couldn't stand it and I would pass out, but I come right back to.

Q. You tell us then what occurred when they came after you.

A. Well, I was laying alongside of the track and some man had his arm around me and was talking and that, and then I started telling my name and where I lived and everything so they could tell my mother.

Q. All right, go ahead.

A. And then from then on I just started praying.

Q. All right, do you remember when you got to the hospital?

A. I don't remember anything for quite awhile then. That was I just blacked out.

Q. I see. Well, after that, after you got to the hospital, Gerry, do you recall when it was that you regained consciousness or semblance of consciousness that you can now remember?

A. The only consciousness that I remember is I

(Testimony of Gerald Stintzi.)

would wake up for a short while and start screaming, like boiling water on me, and they would give me a shot and then I wouldn't know any more.

Q. Do you remember, or can you tell the jurors, what day it was or what month this happened? On July 17th, did it not, 1952?

A. That is correct. [138]

Q. Have you now any independent recollection or remembrance, Gerald, of the day that you began to remember things in the hospital after this accident?

A. No, I don't. I was all over the place.

Q. Well, do you recall that you started to know what the things were about before Christmas of that year? A. Oh, yes, before Christmas.

Q. That is what I am getting at.

A. Yes, it was before Christmas.

Q. All right, you don't recall in days, though, how many days after it was?

A. No, I don't.

Q. Do you recall whether it was before Thanksgiving Day in November? A. Oh, yes.

Q. It was. But you don't just recall how many days, is that correct? A. No, I don't.

Q. All right. Well, after you regained consciousness in the hospital, from the time at least that you can remember, will you tell us what feeling you had with regard to your extremities and your general physical feelings?

A. Well, they gave me shots, but they sure didn't do me any good because it just felt like I was torn

(Testimony of Gerald Stintzi.)

all apart. [139] My leg was feeling like a team of horses was pulling it, my left leg.

Q. How long did this continue?

A. For quite awhile, for months.

Q. Do you recall the times that you were taken to surgery?

A. Yes, some times, not when I first got there.

Q. You don't recall when you first got there?

A. No.

Q. Do you recall when you were taken to surgery, Gerald, about a week, and just about a week after you had been worked on in surgery you were taken back for about a week? Do you remember when that was? Do you remember the occasion when they inserted the pegs in your left leg?

A. No, I don't. When I woke up, they were in my leg.

Q. In your left leg? A. Yes.

Q. But I mean, you remember, though, or you don't remember being taken in to surgery for that?

A. I don't.

Q. I see. Now about a month later or so, on August the 4th, do you remember when they started some skin grafting work?

A. Yes, I remember when they started skin grafting.

Q. Will you tell us what that first skin grafting was, if [140] you recall?

A. It was taken from my stomach, they started putting it on my stump.

Q. They started putting it on your stomach?

(Testimony of Gerald Stintzi.)

A. Stump.

Q. On your stump?

A. Off my stomach to my stump.

Q. They took it off the stomach and put it on your stump. I see. And do you recall how many times you were in surgery for that purpose?

A. No, I don't.

Q. You don't recall? A. No, I don't.

Q. Do you recall the blood transfusions that you had? A. Yes.

Q. Do you recall, were they quite numerous?

A. Yes.

Q. I see. Would that be during or immediately after surgery in most of these cases?

A. I would always wake up with a bottle and be under oxygen.

Q. I see. Now do you remember any surgery that was performed for the removal of a bone bridge on your arm in October, your right forearm? A. Oh, yes. [141]

Q. You recall that? A. Yes.

Q. And during the time that you were there, for the 256 days that you were in the hospital, what was your situation as to being able to sleep, Gerry?

A. I never slept for months and months: I just, I don't know, just dozed off.

Q. Were you able to sleep at all without sedatives? A. No, I always had sedatives.

Q. And did that continue practically all the time that you were in the hospital?

A. 90 per cent of the time.

(Testimony of Gerald Stintzi.)

Q. 90 per cent of the time. What was the condition you had with respect to pain, Gerald?

A. The pins would always drive those severe pains, those pins through my leg, just sharp knife pains.

Q. Did you have pain, too, so far as your vital organs were concerned? A. Oh, yes, yes.

Q. And, tell me, does that still persist?

A. Yes, it has a burning sensation.

Q. And persists to this day, is that correct?

A. That is correct.

Q. And the stump of your leg, what is the situation with that right now? [142]

A. It has a draining part and it just has a funny sensation all the time.

Q. Have you had some drainage from that for sometime past now? A. That is correct.

Q. For about how long have you had that drainage?

A. Two months, something like that, a month or two months.

Q. A month or two months?

A. That is correct.

Q. All right. After you got out of the hospital and you were taken home, did you get up and around or were you in bed at home for some length of time?

A. I was home in bed for some length of time.

Q. Do you remember how many months?

A. No, I don't.

Q. Did you start to try to move around after

(Testimony of Gerald Stintzi.)

you got home, or were you returned to the hospital for further surgery?

A. I moved around after that, after I don't know how long, I moved around with a brace.

Q. You moved around with a brace?

A. That is correct.

Q. Now when you left the hospital, Gerry, besides the fact that you had lost your right leg, what was the condition with respect to your left leg?

A. Well, I couldn't bend it, it just bent to a little [143] degree, and my mother was supposed to half carry me and help me with this brace so I couldn't put much weight on it when I went to the toilet.

Q. Tell me this, when you left the hospital was your left leg in a brace?

A. That is correct.

Q. And where did that brace fit, along the outside or the inside of your leg?

A. From the outside of my leg, from my hip down to the shoe.

Q. From your hip down to the shoe?

A. That is correct.

Q. Was any part of that brace pinned on through the bone? A. No.

Q. It was not. Had they removed those pins?

A. As soon as they removed the pins, I woke up with a brace on my leg.

Q. In other words, after the pins were removed, they placed a brace on it? A. Yes.

(Testimony of Gerald Stintzi.)

Q. And when you were taken home, you had the brace on your left leg?

A. That is correct.

Q. What was the situation with regard to your right arm?

A. Oh, it was really—I couldn't strengthen or bring it out at all and I couldn't twist it back and forth. [144]

Q. Did you have any cast or otherwise on your right arm when you were taken home?

A. No, I didn't have any cast on.

Q. But you had the brace on your left leg?

A. That is correct.

Q. Did you have crutches at that time?

A. Yes.

Q. Are those the crutches right there that you have?

A. No, I was too weak, I used wooden ones.

Q. The ones up under your arm pits, is that correct? A. That is correct.

Q. You used those at that time?

A. That is correct.

Q. And how long were you home before you went back to the hospital, Gerald?

A. I couldn't tell, I wouldn't know the time.

Q. But you were in the hospital through, Gerald, July, August, September, October, November, December, January, on into '53, isn't that right, last year? A. That is correct.

Q. Somewhat approaching 9 months?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Then you went back, did you, to the hospital again? A. That is correct.

Q. And what was the purpose in your return to the hospital [145] the last time?

A. My arm, it was in so much pain they opened it up, opened and did something to it, removed something.

Q. What is that, the stump?

A. My arm.

Q. Oh, it was your arm? That was the last trip, you went back for the arm?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. And worked on that. Have you been back to the hospital since? A. No, I haven't.

Q. Have you been going to your doctor for treatment, however, since? A. Oh, yes.

Q. All right. Now what attempts, Gerald, have you made to strengthen your body since this accident?

A. I tried tumbling and then my arm couldn't take it so I switched to dumb bells where I could relax if it started hurting, to build myself up.

Q. Where did you go for the purpose of taking these exercises?

A. Down in the basement of the YMCA.

Q. In the basement of the YMCA. Have you conscientiously [146] worked on this exercise deal to try to develop yourself?

A. Yes, I have.

Q. Have you tried swimming?

(Testimony of Gerald Stintzi.)

A. Yes, I have.

Q. And have you done a little swimming?

A. I did some at the YMCA, but I fell down once and I didn't try it any more. I went to the lake and had help.

Q. I see, you haven't since. Have you been able to continue your exercises or not?

A. Not to an extensive—not real exertion, just to keep myself.

Q. All right, what happened that you had to stop, Gerry?

A. This hand, it just grips for so long and then the grip is gone.

Q. Has your arm improved any, that is, the right forearm, with your exercises?

A. Been no strength, no.

Q. Would you take that jacket off a minute, please, and roll up your sleeve so this jury can take a look at that arm? Just up to your elbow, Gerry.

A. Yes.

Q. Fold it back so they can see it.

A. (Witness complies.)

Q. If you will turn that back, can you turn that over a [147] little bit?

Mr. Etter: (To the jury): Can you all see this arm?

Q. Will you fold it back up this way, Gerry? Flex it around that way.

A. (Witness complies.)

Q. Now will you explain to the jury what diffi-

(Testimony of Gerald Stintzi.)

culty, if any, you have in the use of this arm. What is it you can't do?

A. It is okay when I go like there (indicating), but when I bring my arm back, the fingers I can't straighten.

Q. What strength does it have when you stretch your arm out in this fashion ((indicating)?

A. In that fashion, that is what happens when I have it straight out (indicating).

Q. Have you any strength there?

A. No.

Q. If you will explain what exercises you have been giving those fingers and explain to the jury how each one of them works and what difficulty you may be having.

A. I was using the rubber ball to get it, because before I couldn't even squeeze a little old sponge. And the two fingers I have got that work pretty good is the two middle ones, but this one here won't close and the end of this one here is dead, just won't——

Q. Which one is dead? [148]

A. This one (indicating).

Q. Can you put this thumb on it, or not, and this one down?

A. That won't close, it just wriggles out like that (indicating).

Q. You just have use of those two middle fingers? A. Yes.

Q. What other exercises do you have besides that?

(Testimony of Gerald Stintzi.)

A. I take and go back and forth like this to strengthen my wrist up and pushups.

Q. But your situation here that you have pointed to, that side has not responded, is that correct?

A. That is correct.

Q. All right. Now, Gerry, did you go down to your doctor and attempt to get a specially built leg that you could use? A. Yes.

Q. And do you recall about how many months ago that has been, Gerry?

A. Quite a few. It has been—I couldn't say exactly, but it has been quite a few.

Q. And what kind of a device was it that they built for you?

A. It had a belt around my hip with kind of a cup on my stump and a strap over my shoulder.

Q. And who did you have build or construct this for you, [149] Gerry? A. Schindlers.

Q. That is the Schindler artificial limb people?

A. That is correct.

Q. And they made it with a belt that comes over the shoulder?

A. That is correct, over this left shoulder.

Q. And a strap that goes around the waist?

A. Yes, a big belt that goes around my waist.

Q. All right, and fitted it to the situation which they found on your right side?

A. That is correct.

Q. After you got that, did you try to use it?

A. Yes.

Q. And try to walk with it?

(Testimony of Gerald Stintzi.)

A. That is correct.

Q. Have you been able to use it, Gerry?

A. No. With the use of crutches, I can make a snail's pace, but that is about it.

Q. In other words, even with leg on, you have to use the crutches?

A. Yes, and sometimes I can maybe use one on a flat deal, but when it comes to stairs, I just need help then when I come to stairs.

Q. All right. Have you taken it back to Schindlers and told [150] them just exactly what the result of your trials and experiment has been?

A. Yes, and they just put a couple of pads on the deal and say, "Well, try the best you can."

Q. You have tried it with the pads?

A. Yes.

Q. I see. Now will you tell the jurors what the effect of the straps and wearing this has on the rest of your body, that is, where you had the skin grafts and likewise your shoulder.

A. When I have it on my left shoulder, I have a graft here, when the belt is on when I am sitting down supposed to be relaxed, it starts to burn, the heat of this leather, and then my stump, the nerves of my stump, that heat just starts my foot going all over, and when I get up it pulls up on this socket or supposed to be of the leg, and when I start to walk I push back down on it and that starts sort of on my stump, and my back is all out of kilter, I get an ache in my back, about the time I am done I'm ready for bed.

(Testimony of Gerald Stintzi.)

Q. Have you found it better on your nervous system and your physical well being to use your crutches?

A. Yes, it feels like I have lost about 10 or 15 pounds after I have used that leg.

Q. And how many times have you tried using that leg? [151]

A. Well, I couldn't say how many.

Q. Have you been consistent about trying to use it? A. Oh, yes.

Q. And what has been the extent of any nervous difficulty that you may have had in the past few months?

A. Oh, my nerves are just jumpy, my nerves are just coming to the point like when I sit in school or that, I just start getting jumpy.

Q. Have you been under treatment ever since you left the hospital for the nervous condition?

A. I had some pills ordered by my doctor for nerves, but then they didn't do me any good.

Q. I see. A. Made me sick.

Q. And of late have you had any difficulty as a result of these discharges that you are having from the stump?

A. Yes, there has been little bones coming out of my left leg, out through the holes I have in my leg.

Q. That is out of the left side?

A. The one I have.

Q. I see. And how about the stump, has there been further discharge from that lately?

(Testimony of Gerald Stintzi.)

A. Oh, when I sit down, I have to sit on my side because after awhile the nerves start jumping.

Q. All right. Gerald, prior to the time of this injury, [152] did you participate in activities in the church, that is, solo singing?

A. That is correct.

Q. And do some choir work?

A. That is correct.

Q. And you likewise turned out, did you not, at the Rogers High School freshman track?

A. That is correct.

Q. And what events were you featured in out there as a freshman, Gerry?

A. I ran the mile and did some broad jumping and cross-country.

Q. And play football? A. Yes.

Q. And did cross-country work?

A. At the same time.

Q. At the same time. Were you planning and were you contemplating when you were at Rogers High School a scholarship by virtue of your athletic ability? A. Yes.

Q. I assume that you didn't have the financial savings to put you through college otherwise?

A. No.

Q. And by working and a scholarship, is that correct? A. That is correct. [153]

Q. And what did you plan on going to school, what had you planned on taking?

A. I wanted to be a doctor.

(Testimony of Gerald Stintzi.)

Q. You wanted to take up medicine, is that correct? A. I wanted to be a psychiatrist.

Q. I see. And this track work, I think you started, as you explained, from the time you were in grade school? A. That is correct.

Q. And did you follow during those years in grade school and up into high school a serious conditioning program?

A. I used to practice and run everywhere I went, and I used to go out to the Rogers track and practice running until dark.

Q. You did that with the Rogers varsity when you were still a grade school kid, didn't you?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. And your coach at Rogers was Mr. Elsensohn, is that right? A. That is correct.

Q. When you were there as a freshman?

A. That is correct.

The Court: Time to suspend now, Court will ad-adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Tuesday morning, June 29, 1954.)

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Proceed.

GERALD STINTZI

having previously been sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Etter): Gerald, you have regained some function in your arms, have you not?

A. That is correct.

Q. Would you explain to the jury the thing that you are [155] still having difficulty with your hand and your fingers? A. Yes, I have.

Q. What measures do you take now, if you can tell the jury, to try to work your hand and your fingers and your wrist back into some semblance of shape?

A. Well, I have been practicing by putting my hand on tables, flat objects like that, and pressing down and trying to bring it up so I could try and strengthen, straighten the fingers.

Q. How long have you been so doing?

A. I have been doing it since I have been out of the hospital.

Q. Since you have been out of the hospital. And the response that you have received from your hand and your fingers you have indicated in your testimony to the jury, have you not?

A. That is correct.

Q. All right. Now, Gerald, have you some considerable difficulty in doing the things now that you used to do before you were injured, that is, the ordinary things that we all have to do, getting out of bed in the morning and things like that?

(Testimony of Gerald Stintzi.)

A. Yes, quite a bit.

Q. And how do you get out of bed in the morning, will you tell the jurors? [156]

A. Well, I used to just jump right out of bed, but now I roll and push myself over to the side with my good hand and then I balance myself so I can get my clothes, and then I sit down on the bed so I can put my pants on, and so on.

Q. All right, and you shave now?

A. Yes, but I have to hold with one hand while I squeeze the tube.

Q. This leg that you have, the one that was made, this prosthetic device by Schindler, are you able to use that for a brace, Gerald, have you tried that?

A. I have tried, but it hurts so bad that after I get done using it the nerves are so bad I just have to go to bed.

Q. And has that resulted in difficulty here lately trying to use that? A. That is correct.

Q. To what is left of your right leg there?

A. Yes.

Q. What has happened as a result of that?

A. Well, started drainage and I had a whole bunch of blisters to my stump—you could call it blisters—and they have healed up, but as soon as I put it back on it starts all over again in a different spot.

Q. Have you discontinued using that entirely?

A. Yes, I have.

Q. I see. And as I gather it, then, any of your

(Testimony of Gerald Stintzi.)

shaving or brushing your teeth or washing of your face or anything like that, you do it by leaning up against the bowl, is that the idea?

A. Yes, I lean up against the side.

Q. And that has been since you were ambulatory, in a fashion so you could get around a little bit?

A. That is correct.

Q. All right. Do you have any difficulty bathing, Gerry?

A. Yes, I have an awful lot of trouble getting into the tub.

Q. And do you have some assistance there?

A. Yes, my mother helps me.

Q. And has she done that ever since you were able to get around?

A. Yes, she used to carry me, she used to half carry me and have to get me into the tub so I wouldn't slip.

Q. I see. And you have had that care from her, have you? A. Yes, I have.

Q. Ever since you were able to get in the bathtub? A. That is correct.

Q. And are you able to do that alone now or not?

A. No, she always has to help me.

Q. And another thing, did you have a number of friends that [158] you ran around with, as youngsters do, prior to your injury? A. Yes.

Q. What has been your situation there as far as recreational activity is concerned, other than the YMCA and the swimming and one thing and another that you have tried to do down there?

(Testimony of Gerald Stintzi.)

A. That has been about it. When I go out with my friends and that, it just cuts me out right there.

Q. And these crutches that you have, have you had any difficulty, Gerald, in using them continuously?

A. Well, my right hand gets awful tired if I go any long distance, just cramps up on me.

Q. I see. Let me ask you, since the accident you were out of school a long time, were you not?

A. Yes, I was.

Q. Have you gone back to school? A. Yes.

Q. And what is that, summer school?

A. I have been going to summer school.

Q. Have you also been taking special courses?

A. I was too sick in the hospital. They wanted me to in the hospital, but I couldn't.

Q. Since that time, Gerald, have you taken some special courses? [159] A. No, I haven't.

Q. Now summer school has been up at Lewis & Clark, has it not? A. Yes.

Q. How have you managed to get to school?

A. I have a friend that comes by and picks me up every morning.

Q. And you have made arrangements, have you, for the past year and a half for that transportation?

A. Yes, I have.

Q. And does he handle your books for you?

A. Yes, he carries my books to every class I go to.

Q. When you are walking or using your crutches, are you able to carry any of those books?

(Testimony of Gerald Stintzi.)

A. I can carry a few things, a tablet and some pencils and that, but that is it.

Q. And have you tried to handle it all yourself, Gerry? Did you try to handle it when you went back to school? A. Yes, I tried.

Q. And were you able to?

A. No, I wasn't.

Q. And you have had this assistance, have you, constantly since you have been back to school?

A. Every class I go to I have had friends to help me.

Q. All right. One other thing, are you able to carry [160] anything, Gerry, when you are standing up, anything of any size; that is, when you are using those new type crutches that you have there?

A. No, I have trouble with my balance. If I start getting some other objects, that throws my balance off.

Q. I see. And tell me this, have you been under treatment or have you received some treatment for any nervous disorders in the past few months?

A. Yes, I have from my doctor.

Q. I see. What is your situation with regard to sleep?

A. Well, at night, some nights my nerves just won't let me go to sleep, and then some nights the pain in my leg just won't let me go to sleep.

Q. And have sedatives been prescribed ever since this accident?

A. I have had nerve pills, but they made me sicker than I was so I had them cut out.

(Testimony of Gerald Stintzi.)

Q. Have you been using anything else lately for your sleep? A. Just aspirins and that.

Q. And has that been fairly constant at different times? A. It has been quite constant.

Q. Let me ask you, these nerve disorders, Gerald, are they sporadic, I mean do they come ever once in awhile without your being able to control them, is that the idea?

A. Yes, they just come. [161]

Q. And at practically any time, is that it?

A. That is correct.

Q. In other words, you haven't a consistent disorder, it is just something that sporadically occurs?

A. That is correct.

Q. Is that correct? A. That is correct.

Q. Have you participated in any school plays or other activities since this accident?

A. No, I haven't.

Q. And did you formerly? A. Yes.

Q. But you have not done so since?

A. No.

Q. Did you at one time compete in dancing exhibitions as a youngster? A. Yes, I did.

Q. And were you fairly successful?

A. Yes.

Q. You haven't been able to do any of that since? A. No.

Q. I see. These things that you formerly did, have you tried to do any of them, Gerald?

A. Oh, yes.

Q. In the past year? [162]

(Testimony of Gerald Stintzi.)

A. I have tried, about everything I could try.

Q. Have you been able to achieve any success?

A. No, I haven't.

Q. And what has been the biggest reason for that? A. In which way do you mean?

Q. For anything that requires you to be ambulatory or move around?

A. Well, the crutches all the time, everywhere I go just have to have those crutches with me, and it just——

Q. And the leg that you had made and have had re-fashioned a couple of times, you haven't yet been able to use that? A. No, I haven't.

Q. Are you able to walk upstairs?

A. With the leg?

Q. Yes? A. No.

Q. Or downstairs?

A. That is twice as bad yet because it buckles. Every time I throw it out, it just buckles.

Q. And you do manage to get up and down with these crutches that you have here?

A. I do.

Q. Is that correct? A. That is correct.

Q. Gerald, prior to working for Addison Miller, had you worked there before? A. Yes, I did.

Q. And when had you worked there before?

A. It was in '50 or '51. I have had so many jobs, I had jobs all over.

Q. Let me ask you, as a youngster have you had other employment prior to the time that you worked for Addison Miller with other employers?

(Testimony of Gerald Stintzi.)

A. Oh, yes.

Q. That wasn't the first time you ever worked?

A. No.

Q. And tell the jurors, if you will, some of the places where you worked and some of the employers that you have had.

A. Well, I started working when I was about 13, I went at Grand Coulee on the dam in construction there, and at Metalline Falls in the mines, Pend Oreille Mines.

Q. What did you do in the mine, Gerry?

A. I was a mucker. That is running this machine that pulls it up in the stope, pulls your material.

Q. You were operating a mucking machine?

A. That is correct.

Q. In the stope? A. Yes. [164]

Q. And that is in, of course, the end of your tunnel, is it not? A. Yes.

Q. A mucking machine is a contrivance that loads it back on? A. Yes.

Q. You worked, assisted on that?

A. Yes.

Q. All right.

A. And I have worked on bridges, when they were building that new bridge in Metalline Falls, I helped there, and truck driving in the wheat harvest and everything, picking berries.

Q. Have you done pretty much toward earning all of your living since you were about 12 or 13?

A. Yes, I have.

(Testimony of Gerald Stintzi.)

Q. Up until the time of this injury?

A. Yes, I have.

Q. Now how many cars were there, or did I ask you that before, that were on Track 13 on the night that you were injured?

A. There were just—to the west of me there was just cars like as far as I could see.

Q. Well, did you know whether those were cattle cars, Gerry, or not? [165]

A. There might have been a few, but they were all not cattle cars.

Q. Is that your best recollection? A. Yes.

Q. Now those cars were spotted or at least they weren't moving there around a quarter to 8 or thereabouts when you were taking the slush out?

A. No, they weren't.

Q. They had been spotted there, but they were there, is that the idea?

A. Yes, they were froze right there.

Q. Do you know how many there were, whether there were 7, 8, 10 or 13 or whatever it was?

A. I couldn't say the number, but there was quite a few.

Q. There was quite a few as you recall it?

A. Oh, yes.

Q. And you, I think, told me that you had worked there in either '50 or '51?

A. That is correct.

Q. Do you recall how long it was that you worked there in that year?

A. It wasn't very long.

(Testimony of Gerald Stintzi.)

Q. I mean was it two weeks or a month, or do you recall how many days it might have been?

A. Approximately two weeks, around two weeks.

Q. Around approximately two weeks?

A. Something like that.

Q. And the work that you did, was it practically the same work as you were doing in 1952 prior to the time of your injury? A. Yes.

Q. Well, tell me, during the time that you worked for Addison Miller, do you recall other occasions when cars were either on Track 13 or Track 12, which was on the opposite side of the dock, I mean were spotted there?

A. Yes, they were always spotted there when we were working.

Q. I mean there were occasions other than this present time when cars were spotted on Track 13?

A. Yes.

Q. During the time you worked there?

A. Yes.

Q. I see. All right, going back to that situation, Gerald, where cars had been spotted there either on 12 or 13, north or south of the icing dock, do you recall in the time that you worked there, either in the year previous or in this year when you were injured in 1952, that any cars were ever moved on those tracks into those standing cars other than this time? A. No. [167]

Q. You never knew of any other occasion?

A. No.

Q. Was it your understanding on July 17th that

(Testimony of Gerald Stintzi.)

when you were working there in 1952 that those cars that were out on that track were frozen there?

A. Yes.

Q. That was your understanding?

A. That was my understanding.

Q. Did you have, as a result of your prior work there, Gerald, on that icing dock doing various jobs, on this night in question when you and Allan Maine and Joe Vallarano were taking this bucket of ice across or swinging it under the coupler and dumping it over there north of Track 13, did you as a result of your experience have any reason to believe that any cars would be moved while you were working there?

Mr. Cashatt: I object to the form of that question.

Mr. McKevitt: Leading.

Mr. Cashatt: It is leading.

The Court: I think that calls for a conclusion, yes. I will sustain the objection.

Q. (By Mr. Etter): Did you expect then that any cars would be moved while you were working there? A. I didn't expect any.

Q. You did not? [168] A. No, I didn't.

Q. Was that as a result of your other experience that you had had?

Mr. Cashatt: I object to that, your Honor.

The Court: Well, yes, that is leading.

Q. (By Mr. Etter): Why was it that you didn't expect any cars to be moved?

A. Because I never had that experience before.

(Testimony of Gerald Stintzi.)

When I looked down to the right of me, there were men working taking salt from the boxcar into the salt pit and that was insurance that there wasn't going to be any cars threw in there.

Q. That was just before you were injured?

A. Yes.

Q. I see. Now this salt unloading operation, can you tell us, Gerald, did you ever work on a salt unloading operation? A. Yes, I have.

Q. Let me see, yesterday, Gerald, you looked at Exhibit 16, do you recall? A. Yes.

Q. And will you tell the jury again what that Exhibit 16 represents, that photograph?

A. This is what they call the salt pit or the salt dock (indicating), and those two slides over here are to the [169] salt pit.

Q. And the two slides to which you are directing your attention now over here, these doors are on that half of Exhibit 16 or the photograph upon which appears a "W" or west, is that correct?

A. That is correct.

Q. And that is the two you make reference to. Will you go ahead and explain what you were going to about those two entrances?

A. Well, there is a boxcar right along side there, the doors——

Mr. Cashatt: If your Honor please, I would like to object to this line of questioning. I wonder if we could approach the bench?

The Court: Well, all right.

(Testimony of Gerald Stintzi.)

(Whereupon, the following proceedings were had between Court and counsel at the bench, in the presence but out of the hearing of the jury.)

Mr. Cashatt: Your Honor, in the original complaint, the amended complaint, and in the statement of contentions, it was all based on the icing of cars, icing operations, and there has been at no time at any of the proceedings, the original complaint, the amended complaint, or the statement of issues, any contention that there was any unloading of [170] salt at the location of Track 13 upon the night of the accident. And yesterday on the first question that was asked in that regard, I made that objection and your Honor permitted the answer that he could testify, as I recall, to what he saw. But it is our position that that is a new element that is being injected into the case and it is outside of any pleadings or issues raised by the statement of contentions.

The Court: Well, as I understand it, it isn't your contention that he was injured in connection with any salt?

Mr. Etter: Absolutely not, it is just an ancillary operation. No, we are not complaining that it had anything to do with it, but it is a factor of notice, we allege notice and that they should have had notice.

Mr. MacGillivray: Our contention is this, he was there while engaged in icing operations. To show the circumstances surrounding it, I think we are

(Testimony of Gerald Stintzi.)

entitled to show that at the time he was engaged in icing operations, other members of the crew were engaged in salt operations, which would have two purposes: first, to lead him to believe, as a reasonable person, that those cars would not be moved, and, secondly, to lead the railroad employees to anticipate that there were men working about that track at the time these cars were switched in there.

Mr. McKevitt: Of course, the allegations in the original complaint, your Honor, and the amended complaint, [171] especially in the amended complaint, you can't read that. I gathered the impression that at the time of this injury he was engaged in icing refrigerator cars, because they allege that those cars had been spotted there for the purpose of being iced, and that is the contention in the statement of issues, also.

The Court: Well, I think that is proper here, regardless of whether it is specifically alleged in the pleadings, to show anything that might bear on, first, his notice of danger, that he is going into a place of danger. You have got volenti non fit injuria here in your pleadings, although you call it assumption of risk, and you have got that element here, what should he have known, what he should have known about the dangerous conditions. Then you have contributory negligence, should he have known, should he have gone in there.

I think he would have a right to show that along in this string of cars somebody was carrying some-

(Testimony of Gerald Stintzi.)

thing out. You would have a right to show that a locomotive was coming down whistling madly. All those things should be shown on either side.

I will overrule the objection.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: All right, proceed.

Mr. Etter: Mr. Oden, can you give us the last question, please?

(Whereupon, the following question was read: "And that is the two you make reference to. Will you go ahead and explain what you were going to about those two entrances?")

Q. (By Mr. Etter): These are the two entrances here that you refer to (indicating)?

A. The boxcar door is open right alongside the window that is into the salt pit, and we put a ramp across, it is either metal or wood, I don't remember, and we have a little cart that we load the salt bags on and we——

Q. Would that be a hand-truck?

A. Yes, a hand-truck.

Q. All right.

A. And then we run it up to this platform that runs across right up to the edge of the window there, and then somebody grabs it from there and carries it over and piles it inside the salt house.

Q. Was that the only way that you transferred the salt from the boxcar into the salt house or were there other ways?

A. Well, sometimes some of them would be more

(Testimony of Gerald Stintzi.)

energetic, they would take one salt bag and carry it to the [173] platform, but it would be about the same.

Q. I see. Now after it was in the salt pit, so-called, how was it used in there, how was it transported out of the salt pit?

A. They carried it over to this little elevator they had that—oh, truck or what do they call it? It is a little pulley car they carry the salt bags to the elevator.

Q. All right.

A. And they load it, they take it and they put it on the elevator and——

Q. Is the elevator or where the elevator operates shown on this picture, that is, Exhibit 16?

A. I don't see the elevator.

Q. No, not the elevator, but where the elevator is used, is that shown? A. Yes.

Q. Can you point out what entrance indicates that?

A. I couldn't say exactly, but I know it is right in this vicinity here (indicating).

Q. You are pointing, are you, just to the left of the crease in the picture? A. Yes, I am.

Q. I see.

A. It goes right up to the level of the dock, up on top. [174]

Q. It is taken up to the level of the dock on top, is that right? A. Yes.

Q. And that is this house that appears up here?

A. Yes.

(Testimony of Gerald Stintzi.)

Q. All right, and then what is done with it?

A. Then it is stacked in the house, some of it, and some of it is on those push cars, it is taken and pushed down the dock toward the east, and then they are laid out, spotted, so we can put the salt in the boxcars that we are going to ice.

Q. On these cars that may appear or may have been spotted along the icing dock, is that correct?

A. That is correct.

Q. And is that what constitutes what you call a salting operation? A. Yes.

Q. From the first step of transporting it from the freight car up until the time it is taken on to the icing dock, is that correct? A. Yes.

Q. Gerry, the brace was removed from your left leg when you went home, is that correct?

A. That is correct.

Q. And that brace replaced a cast with 4 screws that had [175] been put into the leg from the hip on down below, is that right, or nails or whatever they are?

A. It had 4 pins before I had the brace put on.

Q. That's right, and did they remove those pins and then put the brace on?

A. Yes, they did.

Q. What is the condition now of your left leg?

A. In what way?

Q. As to strength and function, flexibility, extension?

A. Well, bending it all the way up, I can't bend it all the way up.

(Testimony of Gerald Stintzi.)

Q. You are not able to do that yet?

A. Not all the way up. And I have pains in the left side of my leg all the time where there is pieces of bone coming out of the holes.

Q. Is that up on the upper third, you would say, the upper two-thirds of the whole extremity?

A. Yes.

Q. I see. And have you the same function as you had before? A. No, I don't.

Q. And this stiffening you talk about, when does that occur?

A. In the morning when I get up.

Q. I see. And you have, have you, full extension and [176] flexion of that leg?

A. Straight out?

Q. Yes? A. Yes, I have straight out.

Q. I see. What is its condition as to strength?

A. Well, I never judged it for strength. It gets me where I am going on crutches.

Q. I see.

Mr. Etter: Your Honor, there are these picture exhibits that we have introduced. To expedite this matter, I wonder if it would be appropriate at this time, rather than hand them around to the jury, if I could have Gerry either be seated here or stand here and go through them quickly with the jury and explain what those views are? It would probably take only about five or ten minutes, rather than just hand them around. There are about 15 of them and I think probably they might have an understanding of this whole picture if we did that.

(Testimony of Gerald Stintzi.)

The Court: Well, all right, you may do that.

Q. (By Mr. Etter): Gerald, would you rather sit down here or hold these up to the jury and explain them to them? A. All right.

Mr. Etter: I will move this chair down here so we can accomplish that. [177]

I might say that will conclude our examination of the witness, your Honor.

Mr. Cashatt: Your Honor, I believe they were all testified to yesterday on the witness stand.

Mr. Etter: They were testified to.

The Court: They were, I think.

Mr. Etter. The jury hasn't seen them and I think just cold, if the jury took 15 minutes, they might wonder what the views were about, and I thought he could just say, "This is a view of so and so."

The Court: I think what he had in mind was to do this rather than pass them around. I don't think there should be detailed testimony.

Mr. Etter: Oh, no, not detailed.

The Court: Just enough to identify them. Just have him state enough to identify each one.

A. This is the tunnel going to the ice house.

Mr. Etter: Just stand back a little, Gerry.

The Court: Let counsel see them, too, of course.

Mr. Etter: Yes.

The Court: He is around to your left there.

A. That is another picture of the tunnel going to the ice house.

The Court: Mr. Etter, I wonder if you shouldn't

(Testimony of Gerald Stintzi.)

have the number given each time? You can look at it and give the [178] number, because otherwise the record won't show what he is talking about.

Mr. Etter: Certainly. The first one that was shown was Plaintiff's Exhibit 2; the second one was Plaintiff's Exhibit 3; now showing Mr. Stintzi Plaintiff's Exhibit No. 4.

A. That is just coming out of the tunnel from where they make the ice, going right up on to the dock.

Q. And handing you now Plaintiff's Exhibit No. 5.

A. That is the place where we took the ice, the slush.

Mr. Etter: That is looking down to the sump pit, Frank.

Have you all seen this? All right.

Q. Plaintiff's Exhibit No. 6.

A. That is another picture coming just from the tunnel going up to the deck—or the dock.

Q. Plaintiff's Exhibit No. 7.

A. That is where we came out to go across the track.

Mr. McKevitt: It is understood all pictures Mr. Etter has shown thus far are pictures of the interior.

Mr. Etter: That is correct.

Mr. McKevitt: Of the interior of the ice house.

Mr. Etter: That is correct.

Q. Plaintiff's Exhibit No. 8.

(Testimony of Gerald Stintzi.)

A. That is right—that little house is where you come up [179] on to the dock.

Q. What direction are you looking there?

A. You are looking west.

Q. Plaintiff's Exhibit No. 10.

A. That is the track north of the dock and that is looking east.

Q. Looking east? A. Yes.

Mr. McKevitt: That is the track you crossed over, Gerald? A. Yes.

Mr. Etter. Track 13, Gerald.

Q. Plaintiff's Exhibit No. 11.

A. That is the same track, the north track of the dock, looking west.

Q. Of the one that you crossed over?

A. Or looking east. Looking east.

Q. As counsel asked you, that is the track you crossed over?

A. Yes, that is the track I crossed over.

Q. Plaintiff's Exhibit 12.

A. That is looking west, the same track.

Q. The direction from which the cars came, is that right? A. That is correct.

Q. Looking west? [180]

A. That is looking west.

Mr. McKevitt: The building on the left is the ice plant?

A. The building on the left is the ice plant.

Q. (By Mr. Etter): And this area is where the things were dumped, is that correct?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. All right.

Mr. McKevitt: Who is the individual in the picture, Mr. Etter?

Mr. Etter: That is Mr. MacGillivray.

Q. Plaintiff's Exhibit No. 13.

A. That is looking west, the same picture of the track.

Q. It is a similar picture of the one just shown?

A. Yes.

Q. All right. And this is the ice dock that counsel referred to?

A. Yes, that is of the ice dock.

Q. And the track you went across?

A. That is the track.

Q. That is where the dump was?

A. Yes.

Q. All right. That is looking west, you said, didn't you? A. That is correct.

Q. Exhibit 14. [181]

A. That is looking east, the track north of the ice dock.

Q. I might ask you this, the tilted roof, is that of the ice dock, so that the jury can fix it?

A. Yes, of the house where you come up on to the ice dock.

Q. And this is looking east, where the others have been looking west, the last few?

A. Yes.

Q. No. 9, Plaintiff's Exhibit No. 9.

A. That is looking east on top of the ice dock.

(Testimony of Gerald Stintzi.)

Q. I might ask you, is that just outside of the door that was shown in the previous exhibit?

A. Yes, that is just outside of the door when you come up on to the dock.

Q. That is looking in what direction?

A. East.

Q. East. Plaintiff's Exhibit 15.

A. That is the farthest back picture, looking east at the ice dock and the track north of the ice dock.

Q. It is further back and it is the same picture as the other one, is that correct? A. It is.

Q. Of the tilted building as the beginning of the ice dock? A. Of the beginning of the ice dock.

Q. I see. And this pole here (indicating)? [182]

A. I don't know.

Q. All right. Plaintiff's Exhibit 16.

A. That is looking right at the salt pit and on top of the dock and the north rail.

Q. Now that is the picture that you explained yesterday as being a half shot of the east side of the building and a half shot of the west side, isn't that correct? A. That is correct.

Q. Pasted together, and ordinarily the track should be absolutely straight across there and the building straight and in perspective all the way?

A. Yes, east and west.

Q. And it is the same building and there is no curve or no corner otherwise?

A. There is no curve.

Q. And that is the salt dock, supposedly?

(Testimony of Gerald Stintzi.)

A. Yes.

Q. Is that correct? A. That is correct

Q. Gerald, would you mark an "X" which would indicate the doorway where you came out and then went across the track?

Have to have a better pen than that. That shows what a ball point does.

A. (Witness complies.) [183]

Mr. Cashatt: When you hold that up, Mr. Etter, you might just show where that makes it look like there is a corner there.

Mr. Etter: I might explain that this is a view, a half shot taken because of the limitation of distance in the back of one part of the shed; this is a view of the other part. That is one part; that is the other part. Putting them together gives that sort of a view in turn.

Mr. McKevitt: It is all a straight track.

Mr. Etter: It is all a straight track and, of course, there is no curvature or corner at all, even though there may appear to be there.

An "X" is marked there, which you will be able to see, which appears right here by my finger as being the entrance from which he came out the door. I will get up close so that you can see that. (Indicating to jury.)

All right, you take the stand.

(Witness resumes the stand.)

You may inquire, Mr. Cashatt. [184]

(Testimony of Gerald Stintzi.)

Cross Examination

Q. (By Mr. Cashatt): Mr. Stintzi, I believe you stated that you had worked at the Addison Miller plant at Yardley, Washington for about 5 days in 1952 before this accident occurred, is that right? A. That is right.

Q. Now in the year of 1951, Mr. Stintzi, I believe you worked at this same plant at Yardley, Washington for about three weeks, is that right?

A. Approximately.

Q. And during that time, Mr. Stintzi, in 1951, did you work in the ice plant itself?

A. Yes, I did.

Q. Now when we say "ice plant itself," we mean, oh, what is shown at the bottom of Defendant's Exhibit No. 1, is that right?

A. Where they make the ice.

Q. Where they make the ice, manufacture the ice? A. Yes.

Q. And in 1951, did you also work on the icing dock which we have been referring to here?

A. Yes.

Q. And during 1951, did you unload salt during 1951? A. Yes, I did. [185]

Q. Now when you came to work in 1951, Mr. Stintzi, when you had arrived there to go on shift, where did you report to?

A. To go to work?

Q. Yes, sir?

A. There was a little place, the house that is

(Testimony of Gerald Stintzi.)

right next to where we make the ice, manufacture the ice.

Q. In other words, you would come over to the ice plant itself, is that right? A. Yes.

Q. And you would go on shift at that location?

A. Yes.

Q. Then, if your duties on a certain shift required that you go to the ice dock, how did you get over there?

A. We went to the long side to where they make the ice and there is a tunnel, we walked down the stairs and go through a tunnel, and then from there we go up to these stairs where they showed up in the picture, up on to the ice dock.

Q. In other words, you would come to the ice manufacturing plant, and then if it was necessary to go to the ice dock, you would go through the tunnel to the ice dock, is that right? A. Yes.

Q. Now you followed that same procedure in 1952, did you, [186] also? A. Yes.

Q. And during the year of 1951, how many occasions did you work up on the ice dock itself? Cany ou give us that generally? Would it be every day during this 3 week period, or twice a day, or what can you tell us about that?

A. Well, it was different intervals. Maybe one week we would work up on the ice dock all the time, and then maybe one day we would be in where they manufacture ice.

Q. And how many times during 1951 did you unload salt? A. I couldn't recall that.

(Testimony of Gerald Stintzi.)

Q. More than once?

A. It might have been; it might have been just once.

Q. During the year 1952, do you recall during that 5-day period if you unloaded any salt during that period of time? A. In '52?

Q. Yes, sir? A. Yes.

Q. Do you know how many times you did?

A. No, I don't. It might have been one or four times, I don't recall.

Q. Now on the 17th of July, 1952, the day of the accident, [187] Gerald, did you unload any salt that day?

A. We worked—I didn't unload salt, I was working by the pulley where they bring it up, up to the dock. There is a pulley in the salt pit.

Q. What time of the day did you work in the salt pit? A. It was before lunch.

Q. And when you say "salt pit," do you mean the area where the salt is stored after being taken out of the boxcars? A. Yes.

Q. And where it is lifted from the lower level up on to the dock, is that right? A. Yes.

Q. Handing you, Mr. Stintzi, Plaintiff's Exhibit No. 8, which I believe you have seen——

A. Yes.

Q. ——which I believe you said was a photograph taken on top of the icing dock looking to the west, is that right, sir?

A. That is correct.

Q. Now you had been up there in that location

(Testimony of Gerald Stintzi.)

on several occasions during your employment with Addison Miller, isn't that right? A. Yes.

Q. And when you are up on that icing dock, Mr. Stintzi, [188] you have a clear view across to the north, don't you? A. Yes.

Q. And you also have a clear view off to the south when you are up on the ice dock?

A. You probably would, I never noticed, I have just glanced all around.

Q. Well, now, when you were there before this accident happened on these various occasions, what did you see sitting on all of those tracks to the north and to the south?

A. There would be boxcars.

Q. And from the location on the ice dock, you had a pretty general view of the entire yard, isn't that right?

A. Well, I could just see boxcars all around, that's all I ever noticed.

Q. And gondola cars, tank cars, and so on and so forth?

A. All kinds and descriptions.

Q. All kinds of freight cars?

A. That is correct.

Q. And in Plaintiff's Exhibit No. 8, in that exhibit it shows boxcars sitting to the north and the south of the ice dock on various tracks, doesn't it, sir? A. Yes.

Q. And the same is true, isn't it, Mr. Stintzi, in Plaintiff's Exhibit No. 9? [189] A. Yes.

(Testimony of Gerald Stintzi.)

Q. That you can see boxcars and freight cars sitting—— A. Sure.

Q. ——in the various portions of the yard?

A. Sure.

Q. Now when you were there prior to this accident in 1951 and in 1952, tell us, Gerald, what noise you would hear, noises that you would hear, when you were up on that dock?

A. You mean talking?

Q. No, the general noise in the area, did you ever hear any general noise in that particular area? A. Never paid any attention.

Q. Did you ever hear boxcars being coupled together, freight?

A. Right around that area they might have, I just never noticed.

Q. Well, through 1951 and '52, Gerald, when you were working up on that dock, you saw switch engines working at various times, you saw that, didn't you?

A. What do you mean by switch engines working?

Q. Working, moving cars around, pushing them from one track to the other, and so on?

A. Yes, moving cars around, outside of some tracks.

Q. Well, you saw that was the general operation of the [190] entire yard there, you observed that, didn't you?

A. Well, I was just busy working, I just did my job.

(Testimony of Gerald Stintzi.)

Q. Well, at times, Mr. Stintzi, you saw switch engines bringing a string of freight cars up, saw them uncoupled, and saw those cars drift down the track; you saw that operation, too, didn't you?

A. No, I never saw any of that.

Q. Never saw that at all in 1951 or 1952 while you were working on the dock where you could look over this yard?

A. I never saw any drift. I would usually see cars that would be there and then the next minute I would maybe drop by there and there wouldn't be any boxcars there.

Q. Well, you knew, Mr. Stintzi, that that was the switching yard, didn't you?

A. That is what they call it, switching yard.

Q. And from what you observed there, you knew there was lots of activity at all times in that yard?

A. Well, there was activity.

Q. And now while you were there, Mr. Stintzi, working on the dock in 1951 and in 1952, you saw boxcars, gondola cars, freight cars, of all descriptions on Tracks 12 and 13; you observed that condition, didn't you?

A. Yes, they were connected to our icers.

Q. Well, you observed that condition, Mr. Stintzi, didn't [191] you, when freight cars in general weren't connected with the icers?

A. No, I didn't.

Q. Did you ever see them make up trains on Track No. 13?

A. No, I haven't, never saw that. When they

(Testimony of Gerald Stintzi.)

usually bring them in there, they would be icers.

Q. Well, on the night of July 17, 1952, the night of the accident, you saw stock cars on Track No. 13; you saw that?

A. The night of the 17th?

Q. Yes, sir.

A. Yes, but there were salt cars connected with them and that. There were always freight cars and that connected with icers and salt cars.

Q. Isn't it a fact, Mr. Stintzi, that when they brought a salt car in, that they brought that in singly without empty cattle cars and gondola cars?

A. They were connected with the salt cars.

Q. Did you ever see them bring a salt car in and put it on Track 13, either in 1951 or 1952?

A. No, when I got down there, they were always there, they were there.

Q. When they brought a salt car in, Mr. Stintzi, it was necessary that that salt car be spotted at a particular location, wasn't it? [192]

A. Yes, so we could open the doors to the salt pit and put the salt—take the salt out of the box-cars.

Q. Well, you knew, Mr. Stintzi, that they put freight cars of all descriptions on Track 13 and that they took them out of there; you knew that, didn't you?

A. Yes, with icers and salt cars. They were always connected.

Q. Never in the three weeks in 1951 or the five days in 1952, you had never seen during that pe-

(Testimony of Gerald Stintzi.)

riod of time general freight cars on that track without icers or salt cars?

A. No, I haven't.

Q. Now on this day, July 17, 1952, a fruit train was spotted on Tracks 12 and 13 about 4 o'clock in the afternoon, do you recall that?

A. July 17th?

Q. Yes, sir? A. I don't recall that.

Q. Well, about that time of the day, do you recall working on the dock icing a fruit train?

A. It has been so long ago, I might have, I might have been up there icing. We ice and go from one job to the other.

Q. Well, on that day, Mr. Stintzi, you came to work at about 3 o'clock, is that right? [193]

A. That is correct.

Q. And as soon as you came to work on that day, did you go over to the dock itself, that is, up to the icing dock?

A. Up on top of the dock, oh, yes, we went on top of the dock.

Q. And to the best of your recollection, what work did you do after arriving at the ice dock on July 17, '52?

A. We might have iced some cars and then pushed some salt around on top, and then we sit around for a bit and talk and that.

Q. You didn't unload any salt after coming to work at 3 o'clock in the afternoon on the 17th of July, 1952?

A. I don't remember. We might have in the

(Testimony of Gerald Stintzi.)

afternoon, because the afternoon, the morning, was so close together that I just can't put them apart. It has been so long.

Q. Well, Gerald, do you remember what time you went to lunch on that afternoon?

A. No, I don't. We have our lunch set that when there is a car comes in, if we don't have anything to do, he tells us, "We'll go down and have our lunch."

Q. So you reached a time in that afternoon or that evening when you didn't have any work at the dock, is that right? [194]

A. When he asked—on July 17th in the afternoon?

Q. Yes, that's right.

A. Yes, we were sitting around talking and just for awhile. At that time when he chose us, we were up on the dock all together.

Q. Now, then, you did go to lunch, though?

A. Oh, yes, we went to lunch.

Q. And as near as you can remember, Gerald, about what time would you say that was?

A. I couldn't give any time, I wouldn't know what time.

Q. And when you went to lunch, Gerald, the entire crew went over at one time, didn't they, from the ice dock to the ice house?

A. Sometimes the entire crew, some were left there. Just when he said lunch, the ones that wanted to go to lunch, they went downstairs, most of them did.

(Testimony of Gerald Stintzi.)

Q. And on this particular day, Gerald, the 17th of July, '52, isn't it a fact that the entire crew, after they finished icing the fruit train, went over to the ice house from the ice dock through the tunnel for lunch?

A. Yes, sometimes not the entire crew, though.

Q. Well, I wasn't saying sometimes; maybe you misunderstood me. A. Oh, excuse me.

Q. My question was confined to the 17th day of July, '52. [195] Do you understand that now?

A. Yes, I couldn't remember, I might say they all went over and they may not have, some of them might have stayed up on the dock.

Q. Well, in any event, yourself, Allan Maine, Ray Davis, Joe Vallarano, the ones that later were working on taking out the slush ice, they all went over at one time for lunch, didn't they?

A. Oh, yes, we went over and had lunch.

Q. And I believe the foreman out there, Foreman Fincher, didn't he go over and have lunch at the same time? A. I never noticed.

Q. You don't remember?

A. I don't remember.

Q. Well, then, following your lunch, Gerald, didn't Foreman Fincher and the rest of the crew all come back in a body to the ice dock?

A. Yes, up on top.

Q. And there were about 7 or 8 in that particular crew that came back with you after lunch from the ice house to the ice dock, isn't that right?

A. Yes, there was a group of us that came back.

(Testimony of Gerald Stintzi.)

I wouldn't know who, but a group of us came back up on to the ice dock.

Q. Yesterday, Gerald, you mentioned there was a crew of [196] about 20. By that you meant the ones working at the ice plant and the ones working at the ice dock, also, didn't you?

A. I said approximately and I meant the ones up on top of the dock and around, down in the salt pit and that.

Q. After you had completed your lunch and came back through the tunnel with Foreman Fincher, isn't that right?

A. I never noticed Fincher until I was up on top.

Q. I see. Well, then, to the best of your recollection, you do remember talking with the Addison Miller foreman on top of the icing dock, is that right? A. After lunch, yes.

Q. And is that the time, Gerald, when you say that he gave you the instruction concerning this work in taking out the slush ice?

A. Yes. We might have iced some cars or did some other little jobs, but a little later after lunch, that is when he gave us our instructions.

The Court: Recess for 10 minutes.

(Whereupon, a short recess was taken.)

The Court: All right, proceed.

Q. Now, Mr. Stintzi, before recess you told us that when you came to work, you came to the place where they [197] made the ice itself, that is, when you came to work for any shift? A. Yes.

(Testimony of Gerald Stintzi.)

Q. And when you went from the ice manufacturing plant to the ice dock, you went through the tunnel? A. That is correct.

Q. Now when you iced cars at the dock, Mr. Stintzi, that was done on top of the dock, wasn't it?

A. Yes.

Q. And in doing that, you weren't on the ground or you weren't going between any cars, were you?

A. No, we worked from the dock on to the boxcar.

Q. And in coming from the ice manufacturing plant to the ice dock, you never crossed any rails or any tracks in doing that, did you? A. No.

Q. That tunnel was underneath the tracks, wasn't it? A. Yes, it was.

Q. And when you unloaded salt, Mr. Stintzi, you did that between the boxcar and the salt pit, is that right? A. Yes, that is correct.

Q. And in doing that, you weren't down on the ground at any time, were you?

A. No, we worked from the box car across the platform into the salt pit. [198]

Q. And you weren't on the rails themselves or you weren't between any cars or between any couplers, were you? A. No.

Q. And now when you went to lunch, Gerald, were there cars on Track 13 at that time?

A. I don't remember.

Q. Were there cars on Track 12 at that time?

A. I don't remember.

Q. When you came back from lunch, Gerald,

(Testimony of Gerald Stintzi.)

were there any cars on Track 12, that is, the track south of the ice dock?

A. There might have been, I wouldn't know. I don't remember, but there might have been.

Q. You don't remember? A. No, I don't.

Q. You can't say whether there were or whether there weren't, is that right?

A. No, I couldn't, I couldn't.

Q. Well, now, when you came back from lunch and when you were up on the dock, did you see any cars on Track 13, any freight cars?

A. I might have and I have have iced some, I don't remember.

Q. Your answer to that question would be that you don't remember? [199]

A. That is right.

Q. Now when you came back to the dock, you say you were up on the dock when your foreman, Mr. Fincher, told you to go down and work and take out slush ice? A. That is correct.

Q. Did he tell you what to use to take that out?

A. He might have, he might have said there was a bucket, but I don't remember. There was so much discussion, I don't remember.

Q. Where did you get the bucket?

A. I don't remember. It might have been down there, I don't remember.

Q. Well, now, did Fincher, Foreman Fincher, go down with you? A. No, he didn't.

Q. Did you know where it was that you were supposed to work? A. Yes.

(Testimony of Gerald Stintzi.)

Q. How did you know that?

A. He said near the pulley where the ice was caked up, and it is downstairs where they were having trouble, and so—then he said to go down there, and so on.

Q. You had come past that location, had you, when you came through the tunnel after lunch?

A. Yes. [200]

Q. And that is how you happened to know where to go to carry out this work, is that right?

A. Yes.

Q. Now you hadn't carried out any slush ice during that 5-day period in 1952 before this date you have been telling us about?

A. No, I didn't.

Q. And you hadn't carried out any slush ice during the year of 1951 when you were working there in that 3-week period? A. No, I didn't.

Q. July 17, 1952 was the first time that you had ever carried out any slush ice? A. Yes.

Q. Is that right? A. That is correct.

Q. Then when you went down there from the top of the dock to this location where the slush ice was, I believe you stated that one of the crew filled the bucket, is that right?

A. Yes, one or two, I don't remember, one or two.

Q. One or two. And then helped pass it to another who carried it outside, did they?

A. Yes.

Q. And then the one that carried it outside

(Testimony of Gerald Stintzi.)

would give [201] it to you and Allan Maine, is that right?

A. We would take the bucket while we were inside, but as soon as we got up to the top, then we would take it.

Q. I see. In other words, you mean when you were on ground level you took it, is that right?

A. That is correct.

Q. And would carry it out the door?

A. Yes.

Q. And after you went down there, a few buckets had been filled, and you and Allan Maine had gone through this procedure you told us about, going over to the car and putting the bucket under the coupling and you crawling under the coupling?

A. That is correct.

Q. Now you say, Gerald, that that was about how far from the door where you were taking the ice out? A. To where we dumped it?

Q. Well, before you crossed the track?

A. Oh, approximately 10 feet, 9 feet, something like that.

Q. Not more than 10 feet from the door itself, is that right?

A. It might have been either way, one way or the other, but I don't think so.

Q. And in what direction from the door where you came out? [202]

A. We went toward the west.

Q. Toward the west? A. Yes.

Q. And I believe after you had carried out 3 or

(Testimony of Gerald Stintzi.)

4 buckets or so, you looked to the east and saw the men working at the salt car, is that right?

A. Yes, I did.

Q. You had carried out, Gerald, about, oh, several buckets before you noticed anybody working at the salt car?

A. No, it was the first or second, the first or second.

Q. But you had taken buckets of slush ice and crawled under the couplings and dumped it across the track before you saw anybody else in that area?

A. I think we noticed them first, because we—I looked both ways, just a precaution, a natural precaution, looked both ways.

Q. Now, Gerald, do you remember when your deposition was taken when you were at Mr. Etter's office, Mr. MacGillivray and myself——

A. Yes.

Q. ——and Mr. McKevitt were present?

A. Yes.

Q. And Mr. Oden, the court reporter here, was there and took down the questions and answers?

A. That is correct. [203]

Q. And when you were sworn on oath, just as you are now? A. Yes.

Q. And, Gerald, were you asked—Page 29—were you asked the following questions and did you give the following answers:

"Well, when you first got down, before you carried out any buckets or anything, did you look down to see them unloading salt at that time?"

(Testimony of Gerald Stintzi.)

Your answer: "No, I didn't look down there."

Question: "Well, how many buckets, possibly, had you carried of ice before you noticed this work with the salt that was going on to the east?"

Answer: "I don't know, I was just carrying back and forth, talking between us, and then looked up there and see some of them working. When I saw them, I thought, well, just every-day occurrence, you know, crew is out there working, that's all."

I will just follow along:

Question: "Any idea how many was in the crew?"

Answer: "No, no, because there was some in the boxcar, probably some in the house." [204]

"Question: "While you were carrying the buckets out, did you ever walk down to where they were unloading the salt?"

Answer: "No, no."

And on Page 28, counsel:

Question: "Were they unloading salt there when you came down from the loading dock?"

Answer: "I did not notice."

Question: "When did you first notice them unloading salt?"

Answer: "I took a look down there—I took a look and I knew they were unloading salt somewhere, but I didn't know where. Then I looked down there and they were unloading."

"Question: "Who was down there unloading salt, do you know?"

(Testimony of Gerald Stintzi.)

Answer: "I only had one friend that was working down there. That was 'Idaho' Davis."

"Question: "Was he unloading salt?"

Answer: "To my recollection, he was."

Question: "And do you know anybody else that was in the crew that was unloading salt?"

Answer: "No, no."

Were you asked those questions at that time, Gerald, and did you give those answers? [205]

A. Yes, I did. That was in the deposition.

Q. Now how many cars, Gerald, were there to the east of this door that you were coming out with the slush ice? A. To the east?

Q. To the east, yes, sir?

A. I couldn't notice because they were going back and forth on that plank.

Q. At any time, did you walk down to the east to see how many cars there were there?

A. No, I didn't.

Q. At any time, did you walk down past the salt house and see the open area which was 300 feet in length under the dock? Did you walk down and see that? A. No, I didn't.

Q. At any time, did you walk any further to the west than the 10 feet that you have told us about where you were going under the couplings of the cars? A. No, I didn't.

Q. Did you look and see the area to the west which was open past, say, this 10 foot distance where this slush ice could have been dumped?

A. Could you repeat that again, please?

(Testimony of Gerald Stintzi.)

Q. I will. Did you look to the west to see an area on the south side of Truck 13, an area where you could have dumped the ice without going across Track 13? [206] A. No, I didn't.

Q. You could have dumped the ice either to the west or to the east without going across Track 13; now, you could have done that, couldn't you, Gerald? A. I never noticed.

Q. These two cars that you were going between, which you say were 9 or 10 feet to the west of the door you were coming out of, those were two cattle cars or stock cars, isn't that right?

A. I never noticed.

Q. You didn't notice? A. No, I didn't.

Q. Well, you walked right alongside of the car, Gerald, in order to get to that location 10 feet west of the door you were coming out? A. Yes.

Q. Didn't you?

A. But I might say there was a cattle car or a freight car and I might be wrong, which I don't remember.

Q. The two cars, Gerald, that you were going between, under the couplers, those two cars were joined together at the couplers, weren't they?

A. They were.

Q. What I mean by that, they were hooked right one to the other, weren't they? [207]

A. Yes, they were connected together.

Q. Now if you had gone to the east, was there anything stopping you from going to the east with this slush ice?

(Testimony of Gerald Stintzi.)

A. The men working back and forth on that plank.

Q. And how high was that platform from the ground?

A. I wouldn't know how many feet.

Q. Well, would you say that came from a box-car to the salt house? A. Yes.

Q. And would that be about as high as is shown in Exhibit No. 16?

A. Right in here, right here and there (indicating).

Q. It would be about up to the door, as shown in Exhibit No. 16, is that right?

A. Yes, that is correct.

Q. And that would be about 45 inches, wouldn't it, Gerald, as near as you could estimate it?

A. I wouldn't know how many inches. I'm not too good on inches.

Q. Well, the couplings you were going under, Gerald, were about 30 inches from the ground to the coupling, isn't that right?

A. I wouldn't know how far they were.

Q. And at that same location, Gerald, besides the coupling [208] itself, there was an air hose hanging down there, wasn't there?

A. There wasn't one hanging low, it was connected some way with the couplings.

Q. Wouldn't it have been easier to go under the platform that the men were unloading the salt from then it would have been to go under the coupling, as you did, Gerald?

(Testimony of Gerald Stintzi.)

A. No, because we probably would have to carry that big bucket under those and then we probably have to still go across the track.

Q. Well, you could have dumped the ice under the 300 foot platform that was there, couldn't you?

A. We were following our foreman's instructions.

Q. Your foreman didn't tell you to go between those cars, did he?

A. He said to go across the track.

Q. But he didn't tell you to crawl under the couplings, did he?

A. Well, we couldn't walk down the west end because we would have just—we just couldn't have carried that big bucket clear around there.

Q. Well, you wouldn't have had to have gone very much farther to the west to come to an open space where this ice could have been dumped?

A. I never noticed on the west because they were going [209] back and forth on that platform.

Q. And which one of these doors as shown on Exhibit No. 16 was it that you say that the salt was being unloaded?

A. I don't know which window that was being unloaded, I didn't know which one. It might have been this one or that one (indicating), I wouldn't know which one.

Q. Well, you have marked on Exhibit No. 16, Gerald, the location where you were coming out with the slush ice? A. That is correct.

Q. Out of the door. But is it your testimony

(Testimony of Gerald Stintzi.)

that you are unable to tell us which one of these openings, the two openings shown on Exhibit No. 16, that they were unloading salt into?

A. Yes, I just noticed them going back and forth.

Q. Now isn't it a fact, Gerald, that when salt is unloaded, that the entire crew is put on that operation?

A. Taking salt from the boxcar into——

Q. Taking salt from the boxcar and putting it into the salt house?

A. Sometimes it wasn't the whole crew, it would be just parts.

Q. When a salt car is put on that track, everything that is possible to be done is done to get it unloaded as soon as possible, isn't it?

A. That is correct. [210]

Q. Because as long as the salt car is on that track, the track is tied up, isn't it?

A. Yes, we want to get the salt in so we can distribute it.

Q. And so, then, when a salt car is unloaded, the entire crew is put on that job, isn't it?

A. No, sometimes we have icers and some stay up and ice and some go down in the salt deal.

Q. Well, now, Gerald, you don't mean to say that they unload a boxcar of salt into that salt pit and while they are doing that they are also hoisting the salt up to the dock?

Mr. MacGillivray: Objected to as argumentative, your Honor.

(Testimony of Gerald Stintzi.)

The Court: Overruled, he may answer.

Mr. Cashatt: Understand the question?

A. Yes. Well, lots of times we never used the hoist, we just piled it inside of the house.

Q. Yes. A. For later use.

Q. It is taken out of the boxcar? A. Yes.

Q. And then piled in the salt house?

A. That is correct.

Q. And then when it is needed at a later time, it is hoisted from the salt house up to the dock itself? [211] A. That is correct.

Q. And that was the usual procedure, wasn't it?

A. Yes.

Q. Now isn't it a fact, Gerald, that on this night of July 17, 1952, that the only salt operation that was going on at that time was the hoisting of salt from the pit up to the dock up above?

A. Before or after lunch?

Q. Oh, no, at the time you were taking out the slush ice?

A. I wouldn't know, they might have been going back and forth, I wouldn't know. They might have been piling it in there, I wouldn't know.

Q. Well, now, Gerald, you say that they might have been going back and forth?

A. I mean, you know, the pulley going up to the dock level, they might have not been using it, just piling to get it in, to get the salt out of the boxcar.

Q. Well, now, who was working over there at that time?

(Testimony of Gerald Stintzi.)

A. Where they were unloading salt?

Q. Yes? A. "Idaho."

Q. Was he unloading salt?

A. He was working in the salt operation of unloading it.

Q. Isn't it a fact that Ray Davis or "Idaho" Davis, as you call him, was in the salt pit with a man by the name of [212] George Stahl and that they were hoisting, working the jig, that takes the salt up to the top of the ice house?

A. I couldn't see around there because I was never down there.

Q. By the way, at the time this accident happened, just at that time, it was dusk, wasn't it?

A. I never noticed. It might have been dusk, I wouldn't know.

Q. It was getting dark?

A. We could see.

Q. You could see, but it was getting dark, wasn't it?

A. I wouldn't know. It might be getting dusk, I wouldn't know.

Q. Well, did you see any lights from the ice dock into the salt car? A. Never noticed.

Q. Did you look? A. No, I didn't.

Q. You say there were men going back and forth from a salt car to the salt house?

A. Yes.

Q. And they had no lights around the boxcar or around the platform that they were walking on?

A. I never noticed. [213]

(Testimony of Gerald Stintzi.)

Q. Well, now, you knew, Gerald, that they moved cars in and out on that track at all times, didn't you? On 13?

A. On which way do you mean?

Q. That they put cars in on that track, that they made up trains there, and that they moved the cars off of the track?

A. When we finished a job, they took it away.

Q. You didn't know anything about the communication system between Addison Miller and Northern Pacific? A. None whatsoever.

Q. You didn't know what the system was to put the cars in nor take the cars out?

A. No, I just knew they come in and went out.

Q. And you knew nothing about the blue light arrangement? A. No, I didn't.

Q. Between Addison Miller; that Addison Miller was supposed to put the blue light on Track 13 or on Track 12 when work was going on on the track; you didn't know anything about that?

A. No, I didn't.

Q. Well, now, Gerald, if you didn't know anything about the communication system between Addison Miller and Northern Pacific, didn't know about the blue light, how did you get the idea that the cars were frozen on Track 13? [214]

A. Oh, because when we were icing cars or taking salt from the boxcar to the salt pit, we always just knew that they would be frozen there; they wouldn't throw in a bunch of cars and endanger our lives, because I never saw it done.

(Testimony of Gerald Stintzi.)

Mr. Etter: What was the last part of that answer? A. I never saw it done.

Q. (By Mr. Cashatt): What do you mean by "frozen?"

A. Staying right there while we are working, not shooting any cars or bumping cars, as you say, into the other cars.

Q. You knew that track belonged to the Northern Pacific Railroad, you knew that Track 13 belonged to them?

A. I never knew, just railroad tracks. I didn't ask around if they were railroad or Northern Pacific or——

Mr. Cashatt: May I take a second, your Honor, to see if I have anything else?

The Court: All right.

Q. (By Mr. Cashatt): You knew, Gerald, that you were working for Addison Miller?

A. Yes.

Q. And that you were not working for Northern Pacific? A. That is correct.

Q. Gerald, you testified, I believe, that you had worked on construction work? [215]

A. Yes, I have.

Q. And had worked as a mucker?

A. Yes.

Q. And had worked as trucker, also?

A. Yes.

Q. And that you had done that for some years before this accident occurred? A. Yes.

(Testimony of Gerald Stintzi.)

Q. And you knew and appreciated the dangers connected with all those occupations, didn't you?

A. I didn't appreciate the dangers, no.

Q. Well, you knew it was dangerous to go under the couplings of two cattle cars that were sitting on a switch track in a railroad company's yard, you knew that?

A. Just as I would going across the street.

Q. Gerald, isn't there a little difference between going across the street and between crawling under the couplers of two railroad cars?

A. Yes, but when there has never been anything happen like that, people bumping cars into cars, just frozen when they were working there and under that, that is, we thought that, all of the workers around there.

Mr. Cashatt: I move that last part be stricken.

Mr. Etter: It is responsive.

Mr. Cashatt: All of it. [216]

Q. Isn't it a fact, Gerald, that when you were taking these buckets of ice out of the door, and so on, that Allan Maine suggested to you that you dump it south of Track 13, that you dump it between the ice dock and Track 13?

A. I don't remember of him saying that.

Q. You never heard him suggest that to you?

A. I don't remember.

Q. Would you say that he didn't suggest that to you? A. I wouldn't know either way.

Q. Your plans, Gerald, at the present time you plan on going to school, do you?

(Testimony of Gerald Stintzi.)

A. Yes, I do.

Q. And what type of school? I mean, what do you plan on taking in school?

A. I'll probably end up taking law.

Q. Are you going to start this fall?

A. Yes.

Mr. MacGillivray: Might change his mind, though, after this.

Mr. Cashatt: That is all.

The Court: Redirect? [217]

Redirect Examination

Q. (By Mr. Etter): Gerald, the night that you were injured, you told Mr. Cashatt that you didn't know anything about the blue lights of Addison Miller. Had you ever been told anything about them? A. No.

Mr. Cashatt: I object to that, your Honor.

Mr. Etter: What ground?

The Court: Overruled.

Q. (By Mr. Etter): Had you ever been told anything about their telephone system?

A. No.

Q. That there was a telephone between the yardmaster's office and the Addison Miller dock?

A. No.

Q. Had you ever been told there was a loudspeaker system right out there where you were working? A. No.

Q. Connected with the yardmaster's office?

A. No.

(Testimony of Gerald Stintzi.)

Q. Never been told any of that, is that correct?

A. No, that is correct.

Q. Well, did you receive any warning of any kind, loudspeaker or anything else that Mr. Cashatt has inquired [218] about, of the approach of any cars or switching movement on Track 13 the night you were hurt? A. No.

Q. Now this place that you were dumping, Gerald, north of the track the slush ice that you have referred to and the area which has been identified by you in several exhibits, I am referring now particularly to Exhibit No. 12, you will note the area to which I refer? A. Yes.

Q. Can you tell us whether to your knowledge these salt sacks of Addison Miller were dumped over there on many occasions?

Mr. Cashatt: I object to that, your Honor, not proper redirect.

The Court: I think it is repetition.

Mr. Cashatt: Repetition.

Mr. Etter: Beg your pardon?

The Court: I think it is repetition, but he may answer. I think he has testified to that before.

A. Well, when they unloaded salt, they always threw the bags over there, just everything that you didn't want you threw over there.

Q. (By Mr. Etter): Well, I am going to ask you whether or not as to this area, whether you ever saw anybody going across this railroad track to dump sacks over there in [219] that area?

A. I never noticed.

(Testimony of Gerald Stintzi.)

Q. You never noticed. Have you seen sacks in this area?

A. Oh, yes. It is always full.

Q. You testified that you had instructions to take the ice north of Track 13, is that correct?

A. That is correct.

Q. You were told to dump it there?

A. Yes, correct, across the track.

Q. And your foreman, Mr. Fincher, gave you those instructions? A. That is correct.

Q. Now, Gerry, counsel inquired about you going to work in the morning and stated that you usually or nearly always checked in or else you went to work from this area where they manufacture the ice? A. Yes, that is where we met.

Q. That's right. And you told counsel that there was a tunnel that went down through here over to the shed? A. That is correct.

Q. And that that was for your use and you would use, isn't that correct?

A. Yes, that is correct.

Q. And that led into the tunnel shed and, of course, put you on the immediate premises of the Addison Miller [220] property, isn't that right?

A. That is correct.

Q. Now on this tunnel shed, you have identified these pictures which are exhibits of the interior of the tunnel shed, have you not? A. Yes.

Q. And the sump where this chipped ice would fall or the one that you were cleaning out?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Was there any place in the tunnel, that is, going over here (indicating), to dump that chipped ice? A. No.

Q. Was there any place in the tunnel shed around any place to dump the ice?

A. I never saw any.

Q. Beg your pardon?

A. I never saw any.

Q. But in the tunnel shed itself, Gerald, referring to Exhibit No. 7, isn't that an open door right from the tunnel shed on the railroad yard level?

A. Yes, that is coming right out.

Q. Yes, on the railroad yard level, is that correct? A. That is correct.

Q. That door was open, isn't that right?

A. That is correct. [221]

Q. And that opens on to the railroad property?

A. That is correct.

Q. It was within about 4 feet of the rails, that is, of the first rails? A. Four or five feet.

Q. Four or five feet. Was there any way for you to dump the ice north of the track without coming out that door?

A. That was the only way.

Q. That was the only entrance, other than going down back from the tunnel and across over here to the ice house, isn't that correct?

A. That is correct, that is correct.

Q. And that is the doorway that you used?

A. That is correct.

(Testimony of Gerald Stintzi.)

Q. Is that right? A. That is correct.

Q. And north of the tracks would be north of the first track as you come out the door?

A. Yes.

Q. What was the situation when you were taking this ice out, Gerry, with respect to the number of cars that were to your west?

A. I looked——

Mr. Cashatt: I object, your Honor, it is repetition.

The Court: I beg pardon? [222]

Mr. Cashatt: It is repetition.

The Court: Well, I think it is. I don't know that he has been asked exactly the number. He may answer.

Q. (By Mr. Etter): If you know?

A. I wouldn't know the number.

Q. Could you tell us whether or not there were three or four to the east?

Mr. Cashatt: Object to that as leading, your Honor. This line has been very leading, I haven't objected.

The Court: I think that is leading, I will sustain the objection.

Mr. Etter: All right, withdraw it.

Q. Gerry, you have testified in your direct examination that there were about between 20 and 25 or possible a few more or a few less in the crew that worked there on shift?

A. That is correct.

Q. Did you ever see that crew of 20 or 25 or a

(Testimony of Gerald Stintzi.)

few more or a few less all working unloading one boxcar of salt at the same time?

A. No, they couldn't get them all in the boxcar.

Q. You never saw that? A. No.

Mr. Etter: That is all.

The Court: Any other questions? [223]

Mr. Cashatt: Just one or two, your Honor.

Recross Examination

Q. (By Mr. Cashatt): Counsel showed you Exhibit No. 12, Mr. Stintzi, and asked you a question in regard to seeing salt sacks across the track there. Isn't it a fact that they bring in whole lines of boxcars on that Track 14 and that they clean them out on that particular track and dump it in between 13 and 14? A. What kind of cars?

Q. All kinds, boxcars, cattle cars, and all types of cars?

A. The only cars I ever saw was salt cars. We did that ourself.

Q. Maybe you don't understand my question. Look at Exhibit No. 12, Mr. Stintzi.

A. Yes.

Q. You see debris of all kinds running way to the west of the ice dock, don't you?

A. That is correct.

Q. And if we had another picture following on down the other way, there would be debris between Tracks 13 and 14 running for a considerable distance to the east, wouldn't there? [224]

A. Yes.

(Testimony of Gerald Stintzi.)

Q. And my question was, isn't it a fact that the Northern Pacific uses Track 14 for a clean-out track where they clean out the dirty cars and they dump that between Tracks 13 and 14?

A. I never noticed that.

Q. You have never seen that? A. No.

Q. But you had seen debris a way to the west of the ice dock and way to the east of the ice dock?

A. Yes.

Q. Between those two tracks, hadn't you?

A. Yes.

Q. Now in regard to the tunnel, there was nothing to prohibit you, Mr. Stintzi, from going back through the tunnel, taking the ice out in the opposite direction that you actually were doing it?

A. The tunnel wasn't big enough for two men and a bucket to go through.

Q. The tunnel, you walk through it satisfactorily?

A. Yes, you could walk through, a person.

Q. And arrangements could have been made to take that slush ice out back through the tunnel, isn't that right? A. I don't think so, no.

Mr. Cashatt: That is all. [225]

Mr. Etter: That is all.

The Court: That is all, then, Mr. Stintzi.

(Witness excused.)

It is almost time to recess. I will recess now until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 p.m., this date.) [226]

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Proceed.

Mr. MacGillivray: Mr. Maine.

ALLAN MAINE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. MacGillivray): Your name is Allan Maine? A. Yes.

Q. Where do you live, Allan?

A. East 3634 Queen.

Q. Allan, will you keep your voice up so we can hear you back here?

A. East 3634 Queen.

Q. And with whom do you live?

A. My parents.

Q. How old are you, Allan? A. 18. [227]

Q. And do you go to school? A. Yes.

Q. Where? A. Rogers.

Q. At Rogers High School? A. Yes.

Q. In what grade are you? A. Senior.

Q. You will be a senior next year?

A. Yes.

Q. How long have you known Gerry Stintzi, Allan?

A. Well, it was when I was a freshman, first year of high.

(Testimony of Allan Maine.)

Q. Were you and Gerry in the same grade?

A. No.

Q. Was he ahead of you?

A. One year, yes.

Q. So you knew Gerry before he was hurt and you have known him since he was hurt?

A. Yes.

Q. Now, Allan, do you recall that Gerry was injured out at Parkwater on July 17, 1952?

A. Yes.

Q. Were you employed by Addison Miller Company at that time? A. Yes, I was. [228]

Q. How long had you worked for Addison Miller before Gerry was hurt?

A. About five days.

Q. When is your birthday?

A. March 31st.

Q. So that at the time Gerry was injured, you were 16? A. Correct.

Q. Now during this 5 days you worked out there, what shift did you work, different shifts or the same shift? A. No, I worked swing.

Q. Is that the shift from 3 to 11?

A. Yes.

Q. Did you know how many shifts they ran out there at the icing dock?

A. Three, I imagine.

Q. In other words, they had a crew out there around the clock so far as you knew?

A. Yes.

(Testimony of Allan Maine.)

Q. Now during this 5 days before Gerry was injured, what type of work did you do?

A. Iced cars and emptied salt and, when the accident occurred, carrying out slush.

Mr. McKevitt: Didn't hear that?

The Court: You will have to speak up just a little louder. [229]

Q. (By Mr. MacGillivray): Did you work in the ice plant itself during that 5 days?

A. No.

Q. All of your work was either icing cars or emptying salt from cars into the salt pit?

A. Yes.

Q. Now when you are icing cars, Allan, are you working on the dock or on the cars or both places?

A. Well, you work on the dock and you work on top of the cars, both.

Q. And those would be cars spotted on the two tracks, the track south of the icing dock and the track north? A. Yes.

Q. Then in the salting operation, how often had you done that, do you know?

A. Every time you would ice a car you would have to salt.

Q. Well, I mean carrying salt out of boxcars into the salt pit, had you done that?

A. Yes, I have.

Q. How many times had you done that?

A. I don't remember.

Q. And as I understand, Allan, when you do that

(Testimony of Allan Maine.)

work, you work in the boxcar itself and from the boxcar across a platform into the salt pit?

A. Yes. [230]

Q. Now on the evening that Gerry was injured, was that before you had your supper or after?

A. After.

Q. What time had you come to work that day?

A. 3 p.m.

Q. Do you recall what time you went to supper, approximately?

A. Well, it was so long ago, it was around—oh, I couldn't say. We did some——

Q. Well, 6, 7 o'clock, 8 o'clock, or 5 o'clock?

A. Well, it was around 6 or 7, something like that.

Q. 6 or 7? A. Yes.

Q. And how long did you boys usually take for supper?

A. Well, you couldn't be away too long, about—oh, we weren't gone from the plant but about 15 minutes.

Q. About 15 minutes? A. Yes.

Q. Do you recall what you had done that day, July 17, 1952, between 3 o'clock when you came to work and the time you went to supper?

A. No, I don't.

Q. Well, do you recall whether you had iced cars or emptied salt or what?

A. Well, I—I can remember doing something, but I know we [231] were up on the dock doing

(Testimony of Allan Maine.)

something. It may have been icing cars, I don't remember.

Q. Well, you do know that you were working between 3 o'clock and the time you went to supper?

A. Yes.

Q. Then where did you have your supper?

A. Well, we went over to the Dairy Queen over on Trent.

Mr. McKevitt: Over where?

The Court: To the Dairy Queen, is that what you said?

A. Yes, the Dairy Queen, and got us a milk shake and a hamburger, and then went right back in the car and back to the plant where we ate.

Q. (By Mr. MacGillivray): In other words, you left the ice dock, went through the tunnel over to the ice plant, then took the car and went over to the Dairy Queen? A. That's right.

Q. Had a sandwich and a milk shake and came right back? A. Yes.

Q. Who had supper with you?

A. Gerry and Idaho, I'm pretty sure.

Q. Who is Idaho?

A. He is a friend of Gerry's and I that was working with us.

Q. Where had you known Idaho? [232]

A. From school. I didn't know him well at the time, but I knew him.

Q. Did he go to Rogers? A. Yes.

Q. Is he the Idaho Davis that was a halfback

(Testimony of Allan Maine.)

at Rogers the last couple of years on the football team? A. Pardon?

Q. He was the Idaho Davis that is on the football team out at Rogers? A. Yes.

Q. Then after you got back to the ice plant from the Dairy Queen, what did you three boys do then?

A. We ate and listened to the car radio, and then our foreman or someone ordered us to go over to the dock and we had this work to do.

Q. And did you go back through the tunnel?

A. Yes.

Q. And up on to the dock? A. Yes.

Q. Then when you got to the dock, do you recall Mr. Fincher, the foreman—— A. Pardon.

Q. Do you recall Mr. Fincher, the foreman for Addison Miller? A. Yes. [233]

Q. When you got back through the tunnel and up on to the dock, did Mr. Fincher instruct you to do certain work? A. Yes.

Q. What work was that?

A. To empty the slush out of the pit or wherever——

Q. Had you ever done that work before?

A. No, I never.

Q. Did you know where the slush pit was?

A. Yes.

Q. And just what instructions did Fincher give you boys as to emptying this slush ice?

A. We were supposed to take the ice out—I don't remember just the words he said, but it was

(Testimony of Allan Maine.)

to take the ice out and take it over on the north side of the tracks and dump it.

Q. And what track were you referring to?

A. The north, outside of the—as you come up the stairs, it would have been north of the door.

Q. That is, the first track north of the icing dock? A. Yes.

Q. And was Mr. Fincher very definite in his instruction that you dump it north of that track?

A. Yes.

Mr. McKevitt: Object to the form of that question.

The Court: It is a leading question, I believe.

Mr. McKevitt: Leading and suggestive.

Q. (By Mr. MacGillivray): Well, after Fincher gave you those instructions, who went down to the slush pit with you?

A. Gerry and Joe Vallarano and some Canadian, I don't know what his name is, and myself.

Q. Was his name John, do you recall?

A. Yes, his first name is John, but I don't know him.

Q. He was a Canadian? A. Yes.

Q. Then when you got down to the slush pit, what went on, what did you do? What did Gerry do and what did Joe do and what did John do?

A. Well, Gerry and I were the first to carry it out, and I think John shoveled and put it in the bucket and Vallarano handed it up a little bit across and then we carried it out.

Q. How big a bucket was it?

(Testimony of Allan Maine.)

A. It was a fairly large bucket.

Q. Do you know what that bucket weighed full of ice?

A. Must have been quite a bit because it took both of us to carry it.

Q. Was it all that two of you could do to carry that bucketfull of ice?

A. Well, one can manage, but it really took a lot of [235] effort. I mean, it took a lot of effort with both of us to do it.

Q. I see. Then did you and Gerry carry the first bucket out, do you recall? A. Yes.

Q. Then when you got out the doorway and faced the track, what was on the track?

A. A train, the boxcars.

Q. Do you know how many cars?

A. Not right offhand, I couldn't say.

Q. Well, Allan, did you look down to the west to see how far the cars extended?

A. Yes, I did.

Q. Do you know how far they extended down to the west?

A. Well, I couldn't see the end of them, but as far as you could see, I imagine. It was dark between the building and the train, I imagine, so I really couldn't say where the end of it was.

Q. Do you remember about what time of night this was when you got down to the slush pit?

A. Approximately 7:30 or 8 or around there.

Q. And was it dark outside or getting dark or just what?

(Testimony of Allan Maine.)

A. Well, it was light enough to see what you were doing, but it was just—I mean, it was starting—I mean, it was just after it started to get dark. [236]

Q. In other words, it wasn't daylight?

A. No.

Q. It was starting to get dark?

A. It was dusk, you might say.

Q. Then when you took that first bucket out, did you look down to the east between the icing dock and the cars on the track?

A. On the east?

Q. Yes, look down the track to the east?

A. Well, there was a platform between the train, there was a salt car and then there was the salt house and there was a platform between there, and I don't know, I never noticed down that far. I mean, they were just working around there.

Q. Do you know how far the railroad cars extended down to the east from where you came out of the doorway?

A. Quite a bit, I imagine.

Mr. McKevitt: Pardon?

A. Quite a bit of distance, if I guess right. I wouldn't know for sure.

Q. (By Mr. MacGillivray): Well, did the railroad cars extend down beyond where they were emptying salt? A. Yes.

Q. Do you know exactly how far?

A. No. [237]

(Testimony of Allan Maine.)

Q. And do you know exactly how many cars there were? A. How many cars was——?

Q. Down by the east? A. No, I don't.

Q. Then, Allan, when you and Gerry first came out with that first bucket, was there any way for you to empty that slush north of the tracks except to go through a coupling? A. No, there wasn't.

Q. Well, when you brought that first bucket out and reached the doorway, just what did you do then, you, and what did Gerry do?

A. Well, we had these orders to take it north of the track and the foreman went back up to the dock, or was up on the dock or something, I can't remember just which, but I figured as long as nobody was around might as well just dump it right there, you know, right around by the door there.

Q. Well, not what you figured, Allan, but what did you do and what did Gerry do when you came out with the first bucketful of ice?

A. I mentioned to Gerry, let's dump it right there, and we had these orders and I just did what we were told then, we just carried out the orders.

Q. What did you do in carrying out your orders? [238]

A. We took it hand in hand and went up to the couplers and Gerry went underneath and it was on the rail, we both put it on the one rail, and then I would slide it underneath and push it over and he would grab it on the north side.

Q. Well, now, as I take it, you put the bucket between a coupling, between two cars?

(Testimony of Allan Maine.)

A. Yes.

Q. Now where was that coupling from the door you came out of? A. West.

Q. Do you know about how far?

A. No. Well, it couldn't have been too far.

Q. It wasn't too far?

A. I can't remember.

Q. Then you and Gerry carried the bucket together up to that coupling to the west of the doorway you came from, is that correct?

A. That is correct.

Q. And then when you got the bucket to the coupling, what did the two of you do with the bucket?

A. Well, we both would—we would put it right on the rail, and then when he went over, well, then I put it down to the middle and pushed it as far over to the north as possible so he could grab it.

Q. You say Gerry went over; you mean over across the track? A. Yes.

Q. How did he get over there?

A. He had to go underneath.

Q. Under the coupling? A. Yes.

Q. Then when Gerry got over there, did you push the bucket over to him? A. Yes.

Q. And he grabbed it from the other side?

A. Yes.

Q. Then where did Gerry empty the bucket, or could you see?

A. No—well, it was right—it would have been right east as you pull it out and just a hair east

(Testimony of Allan Maine.)

of where the coupling was, just as you might——

Q. Then after Gerry had emptied the bucket over north of the line of cars, north of the coupling, what did Gerry then do with the bucket?

A. He would hand it back and I would grab it and take it so it wouldn't be in the way, and then he would come back over.

Q. Now during this operation, Allan, of putting the loaded bucket over to Gerry and then bringing the empty bucket [240] back, were you at any time between the two cars? A. Yes.

Q. Where would you be with reference to the coupling when you would shove it through and then pull it back?

A. Well, I would be just about one foot on one side of the track and the other bending over into the coupling. You would almost be right on top of it.

Q. Do you remember, Allan, how many times you and Gerry had carried a loaded bucket out and dumped it and brought it back before the accident happened? A. No, I don't.

Q. Did Joe Vallarano help empty some of the buckets in that fashion? A. Yes, he did.

Q. Do you know how many?

A. About once or twice.

Q. And did he help Gerry or did he help you, or do you recall? A. Helped me.

Q. Then, Allan, you just tell the jury here in your own words just what happened, where you were and where Gerry was and what you were doing when this accident occurred.

(Testimony of Allan Maine.)

A. Well, we had the orders to empty the slush north of the track, and when we first started we went up there and the bucket was heavy and the foreman wasn't around and [241] I figured, to make it easier, we might as well just dump it there, and he said no, it might mean our job. I don't remember whether he said our job——

The Court: I doubt if the witness understood the question. I think what you want him to answer is what happened at the time the cars moved.

Mr. MacGillivray: Yes.

The Court: Not go back over the whole story again.

Q. (By Mr. MacGillivray): Allan, what I am trying to get at is what were you doing and what was Gerry doing at the time the cars crashed together and the accident happened?

A. He was just handing the bucket back and I reached to grab it.

Q. The empty bucket?

A. The empty bucket.

Q. And what was his position with reference to the rails on the track and the coupling between the two cars?

A. I believe his back was toward the crash, I wouldn't state for certain.

Q. Did he have one foot over the rail or both feet between the rails, or do you remember?

A. I don't remember right.

Q. And what was your position when the crash occurred?

(Testimony of Allan Maine.)

A. I fell backwards and I just reached out like to brace [242] myself and I grabbed a bar and hung on and drug that way.

Q. Where was that bar that you hung on to? Was it on the side of the car or between the cars?

A. It was right the end of a car, there must be a ladder or some bars there. I don't know just which one it is, but I grabbed a bar there. There was some bar there or something to hang on to there and I grabbed that.

Q. Were you struck by the cars?

A. Yes, I was.

Q. Where? A. In the face.

Q. And when you grabbed this bar, then what happened?

A. It started to move the boxcars, they started to move. They didn't move fast, but they were slow. Then they just picked up a little bit and then about, I don't know how far it was, but then I pulled myself up and threw myself out.

Q. Were you dragged——

Mr. Etter: Can't hear. These jurors can't hear and I can't hear.

The Court: It is hard to hear in this room, Allan. You will have to speak up just a little louder.

A. All right.

The Court: Voice doesn't carry very well here.

Q. (By Mr. MacGillivray): Were you dragged down the track for some distance when you were hanging on to this bar? A. Yes.

(Testimony of Allan Maine.)

Q. Where were your feet when you were dragged?

A. One on each side of the track.

Q. You mean one on each side of the track or one on each side of the rail? A. The rail.

Q. Which rail would that be? A. South.

Q. Do you know how far you were dragged down the track? A. No.

Q. How did you finally get out from between the cars?

A. Well, after a bit—well, when they slowed down, I pulled myself up and threw myself out.

Q. What kind of a crash was this, Allan, when the cars came together? A. Very loud.

Q. Then after you threw yourself out, did you throw yourself out on the ground? A. Yes.

Q. Pick yourself up? A. Yes.

Q. Then what happened? What did you do?

A. I run and was yelling to the rest of the crew or who [244] was ever there what happened. I don't remember because I was pretty well——

Q. Did you hear anyone screaming or yelling?

A. Yes, I did.

Q. Tell the jury just what you did and what you heard after you picked yourself up off the ground.

A. Well, it wasn't afterward, it was before while the train was moving. Gerry was yelling real loud, just screaming, going down the track, which you could see part of him but you couldn't see all.

(Testimony of Allan Maine.)

And then there was some yells that come from a salt car.

Q. There was some yells come from the salt car?

A. Yes.

Q. What do you mean from the salt car, inside the salt car? A. Inside.

Q. Inside the car. And then after you picked yourself up, where did you go?

A. I went up on top of the dock.

Q. What did you do up there?

A. Telling them about the accident. I can't remember what I said, pretty nervous.

Q. Did you later go back to where Gerry was?

A. Yes, I did.

Q. How much later? [245]

A. Just as soon as I told them what happened, I run down and followed the train and then I went over the top and saw him laying down there.

Q. And did you get down on the ground over by where he was?

A. About from the distance from where you are.

Q. And what was Gerry doing?

A. He was saying, "Put me out of it, the pain is terrible," and stuff like that. He was conscious.

Q. What did he look like?

A. Well, just chewed off, just ripped, you might say, just yanked something off. It was just blood all over and he was just a mess.

Q. Then how long did you stay around there, Allan? Did you stay there until Gerry was taken away?

(Testimony of Allan Maine.)

A. I didn't stay right there, I left. Too much to look at.

Q. Then when did you go home that night?

A. Right afterwards, just I went up and quit right there, I quit, told them to take the job and I didn't want any more to do with it.

Q. Now, Allan, in your 5 days experience out there, had you ever before the evening of July 17th seen unattended cars float in on either Tracks 12 or 13? A. I have not. [246]

Q. When any of the Addison Miller employees were working on the dock, in, on or around the cars spotted beside the track or dock on either Tracks 12 or 13? A. No.

Q. What was your understanding, Allan, as a member of that Addison Miller crew, as to movement of any cars that were spotted on either Tracks 12 or 13 while you were working on the dock, in, on or around those cars?

Mr. McKevitt: Object to that. That would be calling for a conclusion of the witness.

The Court: Yes, I will sustain an objection to that.

Q. (By Mr. MacGillivray): Well, Allan, when you handed the buckets through to Gerry and then took the empty buckets back from Gerry between the cars and next to the coupling, did you at that time expect that those cars would be moved?

Mr. McKevitt: That is objected to, as to what he expected, your Honor.

(Testimony of Allan Maine.)

The Court: Well, I think so, I will sustain the objection to that.

Q. (By Mr. MacGillivray): Allan, do you recall the white lights on the top of the Addison Miller icing dock? A. Yes.

Q. And are those the lights shown here, overhanging lights [247] on metal poles running down the south side of the dock and also down the north side of the dock? A. Yes.

Mr. McKevitt: What exhibit is that, Mr. MacGillivray, please?

Mr. MacGillivray: Shown on Plaintiff's Exhibit No. 9.

A. Yes.

Q. Do you know how many of those lights there are up and down that dock, those white lights?

A. No.

Mr. MacGillivray: Mr. McKevitt, could we stipulate as to the number of lights without calling a witness? I think you counted them and I think I did, also.

Mr. McKevitt: You mean as of the evening of the accident?

Mr. MacGillivray: Yes.

Mr. Cashatt: I think, Mr. MacGillivray, you need more testimony as to where they are located. Some of them were 300 feet from one end to the other and they aren't all connected together on one switch, a lot of things like that, so I don't think we can stipulate.

Mr. MacGillivray: Well, can we stipulate as to

(Testimony of Allan Maine.)

the number of lights on the top of the Addison Miller dock?

Mr. Cashatt: I don't know myself as to the number. [248]

The Court: Well, you better proceed with the witness, then.

Q. (By Mr. MacGillivray): Well, Allan, at the time Gerry was injured, these two cars crashed together, and at the time you ran immediately up on the top side of the dock, were all of those white lights on top of the dock illuminated?

A. Not unless they had turned some off some place, I don't.

Mr. McKevitt: Can't hear the witness.

A. I would not know.

Mr. McKevitt: You would not know?

A. No.

Mr. McKevitt: All right.

Q. (By Mr. MacGillivray): The question was —I think you misunderstood me—were all those white lights lit?

A. Well, I wouldn't know all the way down, maybe they were and maybe they weren't.

Q. Well, were any of them lit that you are sure of? A. The ones up——

Mr. McKevitt: He is cross-examining the witness, your Honor. He has testified he doesn't know what lights were lighted.

The Court: Unless he knew how many lights there were there, he couldn't possibly know whether

(Testimony of Allan Maine.)

they were all lighted or not. He could say there were some lighted. [249]

Q. (By Mr. MacGillivray): Were any of those white lights lit when you got up on the top side of the dock? A. Yes.

Q. Do you know how many? A. No.

Q. And when your swing shift crew worked at night, either in icing operations or in salting operations, were those white lights on the top of the dock lit at night after dark?

A. I believe they are.

Mr. McKevitt: May I have that last question and answer read?

(The question and answer were read.)

Mr. McKevitt: I wasn't paying close enough attention. I move that the question and answer be stricken unless it is confined to the situation on July 17th of '52.

The Court: That is what you intended, I presume?

Mr. MacGillivray: That's right.

Mr. McKevitt: If he intends that.

The Court: Is that what you intended by your answer, that that is what the situation was on the night of July 17th?

A. That the lights were on?

The Court: Yes?

A. I wouldn't say they were all on, but I know that there [250] was some on.

Q. (By Mr. MacGillivray): Now, Allan, as you and Gerry were taking this last bucket of slush

(Testimony of Allan Maine.)

ice through the coupling and Gerry handed it back to you, did you receive any warning of any nature that cars were drifting down the track in the direction of the cars about which you were working?

A. No.

Q. Did you use to chum around with Gerry much in high school, Allan?

A. Not in my freshman year, no.

Q. Did you know anything about his athletics in high school?

A. I knew he run track.

Q. Know anything about his football?

A. No.

Q. You see Gerry once in awhile now?

A. Now?

Q. Yes. A. Quite often.

Q. You see him more than you did before?

A. Yes.

Q. And did Gerry do the things that the rest of your chums do and try to do now?

A. No. [251]

Q. Where do you see him usually, at home or where? A. Home and at summer school.

Q. Do you go over and visit him at home from time to time? A. Yes.

Mr. MacGillivray: You may examine.

Cross Examination

Q. (By Mr. McKevitt): When you were a freshman at Rogers, Allan, Gerry was a sophomore, is that correct? A. That is correct.

(Testimony of Allan Maine.)

Q. And you met him prior to the time that you started at Rogers or after?

A. After I started to Rogers.

Q. Well, you are a senior now? A. Yes.

Q. And he graduated when, just a year ahead of you? A. '55.

Q. Pardon me?

A. I graduate in '55, 1955.

Q. And Gerry graduated when?

A. He will graduate from summer school.

Q. I see. Well, between the beginning of your sophomore year and during his senior year, you became very friendly, did you not? [252]

A. Yes.

Q. He visited at your home? A. Yes.

Q. Did you visit at his home? A. Yes.

Q. And that is true of Idaho Davis, also, you were all three very chummy, isn't that correct?

A. Yes.

Q. And still are? A. Yes.

Q. Now you went to work for the Addison Miller Company on July 17, 1952, correct?

A. Did I go to work?

Q. That is the day you went to work for them, July—or 5 days prior to that? This injury occurred July 17, '52? A. Yes.

Q. And that was the fifth day that you had worked for Addison Miller?

A. I believe so, yes.

Q. Well, you said you had worked for them 5 days before the accident happened, didn't you?

(Testimony of Allan Maine.)

A. Yes.

Q. So what would that be? There is 17, 16, 15, 14—you went to work, then, on the 13th of July for the first [253] time for Addison Miller?

A. Well—yes, it might be, I don't remember when it was I went to work. I had a day off or two days, I don't even remember, because I was too young, whether it was one day or two days off, so I really couldn't say when I went to work.

Q. Well, did you work for Addison Miller in 1951? A. No.

Q. The first employment that you had with Addison Miller began in July of 1952?

A. Yes.

Q. And it covered a 5-day period?

A. Yes.

Q. Whether you worked every day or not?

A. Yes.

Q. Were there some days in that 5 days that you didn't work? A. No.

Q. Where did you make application for your employment with Addison Miller?

A. At their office down at—I don't remember which street it was. It is underneath one of these bridges up there.

Q. You didn't go to any Northern Pacific office to get work at the Addison Miller plant? [254]

A. No.

Q. You knew that was a separate organization from the Northern Pacific, didn't you?

A. No, I never. I had a friend that worked

(Testimony of Allan Maine.)

there and that is where he got his so I went to the same place.

Q. You had a friend that worked for Addison Miller? A. Yes.

Q. On the icing dock? A. Yes.

Q. What was his name? A. Bob Mildis.

Q. Who? A. Bob Mildis.

Q. Was he working there at the time that Gerald got hurt?

A. No, he wasn't, he was on another shift.

Q. Did you and Gerald go down together to get employment at Addison Miller? A. No.

Q. Was he working before you started to work in July or after you started to work?

A. I think the same day, I wouldn't be sure.

Q. You think you both started on the same day?

A. Yes.

Q. In 1952? A. Yes. [255]

Q. Well, did you go out together?

A. No.

Q. You just went out there and found out that Gerald was working there? A. Yes.

Q. And when you were sent out from the Addison Miller from the downtown office, who did they tell you to report to? Was it Mr. Fincher?

A. I don't remember.

Q. Well, how did you get out to the yards from downtown? A. Hitchhiked.

Q. Walked out by yourself? A. Yes.

Q. And inquired where the Addison Miller yards were? A. At the office.

(Testimony of Allan Maine.)

Q. Yes. Out at Parkwater? A. Yes.

Q. And who did you first talk to when you went out there?

A. I don't remember who it was.

Q. Well, was it Mr. Fincher?

A. Well, there was a bunch of men waiting to be employed. I imagine they all got employed the same day and——

Q. Well, you know now who Mr. Fincher is, don't you? A. Yes.

Q. And you know that he is the foreman that you say gave [256] you these instructions about cleaning out that ice pit? A. Yes.

Q. Well, now, is he the man that put you to work when you went out there the first day?

A. Well, I don't remember. They had more than one foreman out there.

Q. There was a foreman over Fincher, isn't that true?

A. I don't know if he is over him or is the same.

Q. Well, you were instructed by someone what duties you were to perform, were you not?

A. Yes.

Q. The first day you went out. You don't recall who that was? A. No.

Q. Well, do you recall whether it was Fincher or someone over Fincher?

A. I don't recall, it may have been Fincher and it may not have been Fincher.

Q. What work did they put you doing the first day you started to work?

(Testimony of Allan Maine.)

A. I don't know.

Q. Well, was it up on top of the icing dock icing cars?

A. It may have been, I don't remember.

Q. Well, you had never carried slush ice across those tracks under cars before the 17th of July, as I [257] understand it? That is the first time, isn't it? A. Yes.

Q. Well, now, apart from that work, in the 5 days, what did you do there? You only did that once. Did you ice cars up on top of the dock?

A. Yes.

Q. And did you put salt in cars up on top of the dock after the ice was put in?

A. Yes, I did.

Q. And then did you unload salt from boxcars into the salt house? A. Yes.

Q. That was your principal work, was it not, those three jobs?

A. Well, that is what I did at the time.

Q. Yes. You were just there 5 days?

A. Yes.

Q. And when you reported for work out there on your swing shift which began at 3 o'clock, you always entered the main ice plant first, didn't you?

A. Yes.

Q. Did you carry your lunch with you?

A. Sometimes, yes.

Q. We speak of lunch, it would be what you boys would eat around the evening meal time, wouldn't it? [258]

(Testimony of Allan Maine.)

A. Yes, I imagine it would.

Q. You went to work at 3 o'clock, naturally you have something to eat before you went to work, wouldn't you? A. Yes.

Q. Well, that would be your evening meal after you went on shift, would it not?

A. We ate before we went to work and then we had lunch.

Q. Well, what you call lunch, we might call the evening meal, dinner or supper, isn't that correct?

A. Yes, yes, that's right.

Q. And that you state on this particular evening you went to what you call lunch, what we might call dinner or supper, and you went to the Dairy Queen? A. Yes.

Q. And you procured a hamburger and a milk shake there, is that correct?

A. That is usually what we got, yes.

Q. Was that your recollection what you got there that night?

A. I wouldn't know if that is what I got or not, but that is what we usually get. I mean, I don't remember, it could have been some french fries, too, it could have been almost anything we go over there and get.

Q. And then you came back from the Dairy Queen, you went into the ice plant, is that correct?

A. No, I have never been in the ice plant.

Q. Well, on this particular evening, July 17th, you went over to the Dairy Queen and got something to eat, didn't you? A. Yes.

(Testimony of Allan Maine.)

Q. Did you eat it at the Dairy Queen?

A. No.

Q. You brought it back to the Addison Miller plant, didn't you? A. Yes.

Q. Where did you eat? Did you go through the tunnel on to the dock and eat on top of the ice dock?

A. No, we ate over there where there was room to park around the company, around the plant there.

Q. Well, now, in going to the ice plant proper, in going through that tunnel, you never had to cross a single track of the Northern Pacific, did you?

A. No.

Q. In going to the ice house and going through the tunnel, you never had to cross a single track of the Northern Pacific, did you? A. No.

Q. In going up on top of the ice dock, you never had to cross a single track of the Northern Pacific, did you? A. No. [260]

Q. In going out to unload salt from the salt car into the salt house, you didn't have to cross a single track of the Northern Pacific, did you?

A. To go to the salt car?

Q. You went into a boxcar to unload salt into the salt house; you didn't have to cross or get on the rails of a single Northern Pacific track, did you?

A. Well, the boxcar was on the track.

Q. Yes, so you didn't have to get on or across the rails of any track, did you? A. No.

(Testimony of Allan Maine.)

Q. No, and the only time that you were required to cross a track of the Northern Pacific, one rail or another or to get between them, in the 5 days you were out there was this one occasion when you say Mr. Fincher instructed you to dump ice north of Track 13; that is true, isn't it?

A. That is correct.

Q. And that is true of Gerald, also, to your knowledge, isn't it? A. Yes.

Q. And that was the only occasion that Mr. Fincher had instructed you to dump slush ice, isn't it, was on the 17th? A. Yes. [261]

Q. Now do you recall that when you went to work at 3 o'clock in the afternoon of July 17th on this swing shift, which went on to 11 o'clock, you had an 8-hour shift, do you recall you did do some icing operations after 3 and before you went to the Dairy Queen, you did some icing work on refrigerator cars, didn't you?

A. May have, I don't remember if we did or not.

Q. Well, you weren't idle for that whole time you were out there?

A. No, I wasn't idle, but may have been doing something, I don't remember what it was.

Q. Well, you would either be icing cars or unloading salt or salting the cars up above, isn't that correct?

A. Or else putting salt on the dock.

Q. On putting salt on the dock, all right.

A. I don't remember.

(Testimony of Allan Maine.)

Q. Do you recall that afternoon that there was a long fruit train that came in there to be iced?

A. No.

Q. You don't recall working on that train?

A. May have, I don't remember.

Q. You don't recall? A. That's right.

Q. Well, do you recall at the time you went to lunch, what time that was? Was it 6 o'clock or 7, or what time it [262] was?

A. It was about that time, 6 or 7.

Q. Yes. Well, now, as a matter of fact, at the time that Gerald got hurt and you boys started to clean out this slush pit, that was around 8:30, between 8:15 and 8:30 in the evening, wasn't it?

A. I don't know. It could have been later, it could have been earlier.

Q. Well, you used a time here around 7 o'clock, 7 or 7:30; I am wondering if you meant by that, that that is the time you started to carrying this ice out of that slush pit; that isn't true, is it?

A. I don't know. What was the question again?

Q. What I am trying to get at, Allan, I know this is two years ago, your best recollection of what time of the evening was it when you and Gerald started carrying ice out of that slush pit?

A. It was just getting dusk, I imagine, or it was dusk.

Mr. Etter: Can't hear you, Allan.

A. It was about dusk.

Q. (By Mr. McKevitt): Well, whether it was 7, 7:30, 8, or 8:30, you don't know?

(Testimony of Allan Maine.)

A. That's right.

Q. These instructions that were given to you by Mr. Fincher, who did he give them to? Did he call you [263] several boys together and say, "I want you fellows," naming you, "to go down and clean out the ice pit," or how did he designate that particular crew?

A. Gerry had the crew, he picked the crew.

Q. Pardon me?

A. Gerry picked the crew.

Q. Oh, Mr. Fincher, then, told Gerry to pick a crew and go down and clean out the ice pit?

A. Yes.

Q. And then Gerry came back and selected you and Gerald and Idaho Davis, is that correct?

A. We were all together when he told him, the whole crew, or most of them. I don't know if it was the whole crew or not, but we were up on top of the dock when he gave the order.

Q. Well, how many Addison Miller employees were on top of the dock when you got these instructions that somebody got?

A. Quite a few, I imagine. I wouldn't know for sure how many there was.

Q. Well, Gerald has used a figure of 20 or 25 employees of the Addison Miller, he thought, that was his best guess. Were there that many on top of the dock at the time that Fincher gave these instructions?

A. Could have been, I wouldn't know. [264]

Q. Fincher didn't say to you, "Allan, Mr.

(Testimony of Allan Maine.)

Maine," or "Maine, go down and clean out the ice pit," he never said that to you, did he?

A. No, he never.

Q. And he didn't say to Gerald, "Gerald Stintzi, you go down and clean out that ice pit," he didn't say that to him, did he?

A. I don't know, I don't think so, I don't know. I couldn't say, that was two years ago, that is a long time. I don't remember what he said.

Q. Well, did you hear him talking to Vallarano personally?

A. No. I don't know, I don't know what happened after that.

Q. Well, you said that you were instructed, as I understood you to say, "We were instructed to go down and clean out the pit and dump this ice north of the track?" A. That is correct.

Q. What I am getting at is, Mr. Fincher, the Addison Miller foreman, didn't tell you to do that, did he?

A. There was a crew that was told to do that.

Q. Well, who picked this crew?

A. Gerry.

Q. Huh? A. Gerry.

Q. Gerald Stintzi? [265] A. Yes.

Q. He selected you, did he? A. Yes.

Q. And he selected Vallarano? A. Yes.

Q. And Idaho Davis? A. No, not Idaho.

Q. Well, some Canadian boy or chap?

A. Yes.

Q. So then Gerald said to you fellows, "Come

(Testimony of Allan Maine.)

on, we're going down and clean out that ice pit?"

A. Yes.

Q. Did you personally hear Mr. Fincher tell anybody to dump that ice north of that track?

A. No—yes, I did.

Q. You said what?

A. Yes. I was with him when he was there to give the orders.

Q. I see. So then you went down into the ice pit, these four or five of you, and somebody is down in the slush pit, as it is called, the ice pit, and he fills the bucket, shovels into a bucket, is that right?

A. Yes.

Q. And it is ice that has been all broken up as it goes through that conveyor, is that correct? [266]

A. Yes.

Q. Ice that would melt very quickly in warm weather if dumped on the ground? A. Yes.

Q. Isn't that right? A. That is correct.

Q. Yes. And the first operation of carrying it from one side of Track 13 to the other was by you and Gerald, is that true?

A. Yes, that is correct.

Q. And then after so many buckets had been handled by you two, then Vallarano changed off with somebody? A. Correct.

Q. And whose place did he take, yours or Gerald's? A. Gerry's.

Q. So then you and Vallarano carried a certain number of buckets from one side of Track 13 to the other, is that correct? A. Yes.

(Testimony of Allan Maine.)

Q. How many buckets?

A. Oh, two—I don't remember how many it was.

Q. And then there was a switch back then from Vallarano to Gerry, is that true? A. Yes.

Q. What happened, did Vallarano get tired or something? [267]

A. Yes. I don't know if he got tired or not, but that is just the way it happened.

Q. How old a man was Vallarano?

A. I don't know.

Q. Was he older than you and Gerald? A. Yes.

Q. Was he over 20? A. Yes, I imagine.

Q. Well, about how old was he at that time?

Mr. Etter: He already said he didn't know. Going to guess his age, count rings around them or

Mr. McKevitt: Well, I can ask him approximately.

Q. He was over 20, was he, you say? A. Yes.

Q. And you don't know how much over 20?

A. No.

Q. But, anyway, it is a fact he says, "Well, this is a little too heavy for me, you fellows take over;" that is about what he said, wasn't it, carrying the ice in that manner under those couplers; isn't that true?

A. I don't know if he said—what he said. I know after I come back, Gerry and I started over again.

Q. Now when you came up with this first bucket of ice out through that door on the north side of

(Testimony of Allan Maine.)

the ice dock, [268] you would be facing that direction, there are some cars on that Track 13, isn't that correct? Isn't that right?

A. I don't know the track numbers.

Q. Well, the way we orient, this is east and this is west (indicating). A. Yes.

Q. Let's assume this is the Addison Miller dock, you come out the door there and you walked and here is Track 13, isn't that true? You are looking north now, then you made a left-hand turn and you walked to the west, didn't you?

A. We come out of the door and we went on the west, yes.

Q. Made a left-hand turn? A. Yes.

Q. Now when you did that, why did you turn to the west instead of the east?

A. That way would be away from the dock.

Q. You are speaking about the salt dock now?

A. I am speaking of the what?

Q. You say you wanted to get away from the dock? A. We are carrying the ice.

Q. Oh, you mean the ice dock itself?

A. We are carrying the ice bucket to the west.

Q. Why didn't you go to the east with it? [269]

A. There was men working there.

Q. Pardon?

A. There was men working toward the east in the salt car.

Q. How far were they from you?

A. I don't know.

(Testimony of Allan Maine.)

Q. Well, were they one boxcar length or two boxcar lengths? A. I wouldn't know.

Q. You haven't any idea? A. No.

Q. So what you did, you came out and you saw these men up there to the east of you and this platform, isn't that true? A. That is correct.

Q. And you decided instead of crawling under this platform with a bucket of the ice, you would pass it under the coupler, it would be quicker to do it and you wouldn't have to walk so far; that is true, isn't it?

A. Well, we had no—we never had to take it down that way, anyway. There was no reason why we should take it down that way.

Q. But before you crossed that track at all and while you were between Track 13 and the dock, you suggested to Gerald, didn't you, that you dump that ice between Track 13 and the icing dock; you did that, didn't you? [270]

A. Yes—it was to dump—we didn't have to go across because that would just mean we would have to mess around with the bucket more, so I just suggested that we dump it there, but that would have been right underneath the dock and there was nothing supposed to be dumped underneath the dock.

Q. That is a big wide bare space of ground under that ice dock, isn't it? A. Yes.

Q. Ordinary dirt, isn't that true?

A. Yes.

Q. You dumped that ice on there and it would

(Testimony of Allan Maine.)

probably melt within 15 minutes, 20 minutes, or half an hour, depending on the weather, and that was July, isn't that correct?

A. Could have, maybe.

Q. Yes. So when you walked this 10 feet to the east, you were just going to the first opening between the two cars; that is what you were picking out, wasn't it? A. Yes.

Q. And you knew those two cars were coupled together? A. Yes.

Q. And you knew there was an air hose likewise in there in addition to these iron couplers, didn't you?

A. I don't remember if there was or not. [271]

Q. And this big ice bucket you had would carry about how many pounds or gallons of ice?

A. Oh, I wouldn't know.

Q. Twice as big as this waste basket?

A. I don't know, it could have been bigger around than that.

Q. About the same height?

A. I don't know. If I saw the bucket, I might be able to tell you, I don't remember what size it was. It was a fairly large bucket, that's all I remember.

Q. Had a handle on the top? A. Yes.

Q. So each one of you could get hold of a side and you could walk with the bucket with one carrying it, isn't that correct?

A. That is correct.

Q. When you got down to these two cars that

(Testimony of Allan Maine.)

were coupled and Gerald then first crawled under the couplers, did he not? A. Yes.

Q. To get to the other side of the track?

A. Yes.

Q. And then you in some manner took this ice bucket and what did you do? Assuming this is the coupler, did you raise it over the coupler and hand it to him? [272] A. No, I never.

Q. No, you slid it underneath? A. Yes.

Q. Is that correct. And then he would reach from the other side and pick it up and go over and empty it in this space? A. That is correct.

Q. Isn't that true, and then he would come back and he would get down on his knees, I assume, wouldn't he, to pass this under the couplers?

A. I don't know if he had to get down on his knees or not, but he passed it back.

Q. Well, a portion of his body had to get in between the rails to hand it to you, isn't that true?

A. Yes.

Q. From the other side, you would reach and pull it out? A. Yes.

Q. Is that correct. And then after that was done, why Gerald would either crawl over the couplers or crawl under them to go back to the ice dock with you, wouldn't he? A. Yes.

Q. And how many times did he do that before Gerald was hurt?

A. I don't know, I couldn't say. [273]

Q. Well, was it more than five?

(Testimony of Allan Maine.)

A. It may have, I don't remember how many times it was.

Q. Haven't you any idea at all how many buckets of ice you carried, you and Gerald, before he got these terrible injuries he got?

A. That was two years ago, as I said, when I was 16 years of age. I don't really remember how many loads it was.

Q. The real reason that you suggested to Gerald to dump that ice between the dock and Track 13 was that you felt it was dangerous to be crawling under those cars, didn't you? Now that is true, isn't it?

A. Dangerous? Well, you look—it is, no, not dangerous; you expect safety when you work in a place like that. I mean, you automatically think that they should have some precautions for safety.

Q. You mean Addison Miller?

A. I mean whoever runs the railroad there, that part.

Q. You weren't working for the railroad, were you?

A. I was working for Addison Miller, but that is just what—I mean, the whole thing was supposed to be safety. I mean, if I had knew it was dangerous to work there, I wouldn't have ever went to work there.

Q. In other words, you thought that every time you worked at Addison Miller, whether you were carrying ice between cars or under couplers or

(Testimony of Allan Maine.)

wanted to cross over [274] for any reason, that you felt it was safe to do that? A. Yes.

Q. No matter what kind of work you were doing? A. No matter what kind.

Q. Even if you were going to go to lunch, instead of walking around the cars, you felt it was safe to go through them, is that right?

A. We didn't have to crawl through cars to go to lunch.

Q. Now you had learned, had you not, in the 5-day period that you worked there and before Gerald received these bad injuries, that when any cars were being iced, you knew that the Addison Miller man would put a blue lantern up on the top of this ice dock that could be seen by railroad men; you knew that, didn't you? A. Did not.

Q. You didn't know anything about that?

A. No.

Q. Well, you have learned since that that was the fact? A. I have since the accident.

Q. How long after the accident was it that you learned that the way the Addison Miller men would warn Northern Pacific switch crews that there were men working in or near cars was by putting this blue lantern up on top of the ice dock? How long after Gerald was hurt did you learn that was the practice on the part of Addison [275] Miller?

A. After the accident.

Q. Right after the accident, wasn't it?

A. Yes.

Q. Within a day? A. I don't remember.

(Testimony of Allan Maine.)

Q. Is that true?

A. I don't remember if it was within a day or what it was. It could have been.

Q. Didn't you express the opinion that if the Addison Miller man, Fincher, had had this blue light up on the platform and put it there like he was supposed to do, that Gerald wouldn't have gotten hurt?

Mr. MacGillivray: Just a minute. I object to that, your Honor, as calling for an opinion.

The Court: I think if you are going to lay the foundation for impeachment, you should show when and where and in whose presence you claim he made the remark.

Q. (By Mr. McKevitt): Do you recall meeting Mr.—stand up—see that gentleman there?

A. Yes.

Q. Do you recognize him?

Mr. Etter: Speak up, please, Allan.

A. No.

The Court: He said to speak up. [276]

The Witness: Oh.

Mr. Etter: Speak up, we can't hear half of your answers.

Q. (By Mr. McKevitt): Do you see this gentleman here (indicating)? A. No.

Q. Did you ever give any statement to any representative of the Claim Department of the Northern Pacific shortly after this accident?

A. I may have, I don't remember.

Q. A signed statement?

(Testimony of Allan Maine.)

A. I don't know, I may have.

The Clerk: I have marked Defendant's Exhibit 17 for identification.

Mr. McKevitt: May I approach and hand this to the witness, your Honor?

The Court: Yes, all right.

Q. (By Mr. McKevitt): I show you Defendant's Exhibit No. 17 for identification, and calling your attention to a signature at the bottom and some writing there in pen and ink, will you examine it, please? A. What is that?

Q. Well, I will ask you, is this your signature, Allan A. Maine? A. Yes. [277]

Q. Do you see the date July 18, '52?

A. Yes.

Q. That was the day after the accident, wasn't it? A. Yes.

Q. This A. C. Thomsen, that is the man who took your statement, isn't it, of the railroad?

A. It must be him.

Q. Did you give that statement to him voluntarily of your own free will? A. Yes, I did.

Q. Did you read it before you signed it?

A. Yes, I did.

Q. Did you understand its contents thoroughly before you signed it? A. I believe so.

Q. Mr. Thomsen didn't suggest to you that you say anything, did he, except to tell him what you knew about this accident, isn't that correct?

A. That is correct.

(Testimony of Allan Maine.)

Q. I will ask you in that statement if you didn't state to Mr. Thomsen as follows——

Mr. McKevitt: I might say to your Honor, that counsel for the plaintiff have copies of this statement in their possession and have had for sometime.

Mr. MacGillivray: Mr. McKevitt, aren't there two [278] statements from this witness?

Mr. McKevitt: Well, yes, you have got copies of both of them.

Mr. MacGillivray: Let's have both of them.

Mr. Etter: Let's have both together.

Mr. McKevitt: Can't put them both in at one time.

The Court: All right, go ahead.

Mr. MacGillivray: Wait for the second one, then.

Mr. McKevitt: All right, we will just wait.

Q. I will ask you if in this statement, Exhibit 17, of July 18, 1952 at Spokane, Washington, you did not state to Mr. Thomsen as follows:

"I know there are blue lights overhead on the dock, electric lights, and I understand that switchmen are not to move the cars we are working on until it is clear. Account I can't see the blue lights from where we were working, I don't know if they were burning or not. I think our foreman at the ice dock was supposed to turn on those lights when we are working on the cars there. I believe the cause of the accident was carelessness in not having the lights turned on when we worked there."

(Testimony of Allan Maine.)

You made that statement, didn't you, to Mr. Thomsen? [279]

A. Lights that I mentioned there are the lights at the east end of the dock which I was talking about, if that is the lights.

Q. Well, you were referring to carelessness in not having the lights on; you are referring to the carelessness of Mr. Fincher, the foreman for Addison Miller, aren't you?

A. I don't know who I am referring to.

Q. I see. Now apart from these instructions that you state you heard Mr. Fincher give to dump this ice north of Track 13 and between 13 and 14, you don't know of any reason at all, do you, why the ice had to be dumped there instead of under the dock or between 13 and the dock, no reason for it, was there, except that he told you to do it, as you have testified?

A. There was—we were following out orders.

Q. Yes. But there was no reason that you know of, apart from these orders, why that ice couldn't have been dumped between the dock and Track 13 or under the dock, except for the orders?

A. I believe you are not supposed to be underneath the dock.

Q. Pardon me?

A. I believe you are not supposed to be underneath the dock. [280]

Q. You believe what is not supposed to be under the dock?

A. A person is not supposed to be underneath

(Testimony of Allan Maine.)

the dock when there is a train or anything like that at all.

Q. You mean underneath the ice dock?

A. That's right.

Q. Well, if you are underneath the dock, no train can injure you, isn't that true?

A. That is correct, but falling ice can.

Q. Pardon me? A. Falling ice can.

Q. Where would the ice come from that would be falling if you were underneath the dock?

A. On top of the dock.

Q. If they are icing cars? A. Yes.

Q. I see. But at the time that you and Gerald went down there to carry out this slush ice, there was no icing of cars going on; you know that, don't you?

A. I believe so. I don't know, I really couldn't say, I don't think they were.

Q. You know there was no icing of cars going on; you know that, don't you?

A. There may have been, I don't think there was, though. I wouldn't say for sure.

Q. You state that you recall there was a salt car there [281] that evening just prior to the time Gerald was injured?

A. Before, before the accident.

Q. Yes. Are you positive of that?

A. That the car was there before we went to lunch or afterwards?

Q. Was the salt car there before you went to lunch; isn't that correct?

(Testimony of Allan Maine.)

A. I wouldn't know.

Q. You don't know? A. No.

Q. Well, was there a salt car after you came back from lunch? A. Yes, there was.

Q. Right opposite the salt dock?

A. Right opposite the salt house there.

Q. Yes. So, then, that car must have come in there after you went to lunch, is that true?

A. Yes.

Q. And how many cars were there between that salt car and this door out of which you and Gerald came with this bucket of ice?

A. I don't know.

Q. There weren't more than two cars, if there were that many, east of that door, were there?

A. I don't know how many cars there is, I don't know the [282] distance.

Q. You don't know——

Mr. MacGillivray: Allan, try your best to speak up. I know I am having a little trouble and the jurors are having a little trouble hearing you.

The Witness: Yes.

Mr. MacGillivray: What, are you a little scared up there?

The Witness: Yes.

Mr. McKevitt: Well, not with me, are you?

Mr. MacGillivray: Well, it might be me. I think probably it is me.

The Court: Older people get nervous, too, even I get nervous, too, so don't let it bother you too much.

(Testimony of Allan Maine.)

All right, go ahead.

Q. (By Mr. McKevitt): Well, now, you have described the salt car as being opposite the door of the salt house. What kind of cars were these between which you were passing this ice? Were these boxcars, cattle cars, what were they?

A. I don't remember what they are.

Q. You don't remember? A. No.

Q. And you don't remember what kind of a car was east of the salt car? [283] A. No.

Q. Or west of the salt car? A. No.

Q. What kind of a car was the salt car?

A. Freight car, I guess. I wouldn't know because I don't even know what they call cars.

Q. Would it be safe in saying that most of the work that you did in that five days there, Allan, was up on top of the dock icing cars? Would that be where you worked most of the time?

A. Yes.

Q. And, of course, the top of the dock is above the tops of these refrigerators which are to be iced, aren't they? A. Yes.

Q. Probably two or three feet. You know what they call them, call them "reefers," don't they, "reefers," short for refrigerators?

A. Ice cars, I guess that is it.

Q. Reefers, and all cars are iced from the top of the cars, aren't they? A. Yes.

Q. There is an opening on the end of each refrigerator car probably three or four feet in length, is that right, something like that? [284]

(Testimony of Allan Maine.)

A. At the top of the car?

Q. Yes, where you put that big chunk of ice?

A. I don't know, could have been. It wasn't quite that big, I don't imagine.

Q. Say this is the dock here, the icing dock, (indicating) the ice comes along on this chain, a conveyor, doesn't it? A. Yes.

Q. And it can be picked off then from along there, depending on where the refrigerator car is, isn't that right? A. Yes.

Q. And then it is slipped over and down here a foot or two below the icing dock is the top of the car to be iced, isn't that true?

A. Yes, that is correct.

Q. And you shove it right over into that opening, isn't that right? A. Yes.

Q. And then some of you either have these pick axes or something you chop this ice up very fine, isn't that true? A. That is correct.

Q. And then before the door is closed, there is so much salt sprinkled on top of the ice, isn't that correct? A. Yes. [285]

Q. And all the time that those cars were being iced, you have observed, have you not, when you worked there, the Northern Pacific man who was keeping track of the amount of ice that would go into each refrigerator car; you have observed that man there, haven't you?

A. I know there is a man that does that.

Q. Yes, a Northern Pacific man?

A. Well, I don't know if he is Northern Pacific

(Testimony of Allan Maine.)

or who he was, I know there was a man that did it.

Q. That was checking the number of cakes of ice that went into each car, isn't that right?

A. Yes.

Mr. McKevitt: That is all.

The Court: We will take a 10 minute recess.

(Whereupon, a short recess was taken.)

Mr. McKevitt: May I ask one additional question, your Honor?

The Court: Yes, all right.

Q. (By Mr. McKevitt): Allan, I would like to show you Plaintiff's Exhibit No. 16, a photograph. Have you seen that photograph before during the course of the trial? A. Yes.

Q. You have discussed it with Gerald's counsel, is that [286] right? A. Yes.

Q. And you recognize——

Mr. MacGillivray: Mr. McKevitt, he won't speak up while you are right there.

Mr. McKevitt: All right.

Q. You have discussed this photograph and its various aspects with the attorneys for Mr. Stintzi, haven't you? A. Yes.

Q. Now we have agreed that this portion of the picture, which is the left side of the picture, represents one portion of the building; you understand that? A. Yes.

Q. Now referring to that and showing you this opening here where I am pointing, are those white sacks of salt there, would you say?

A. Yes, that is salt.

(Testimony of Allan Maine.)

Q. That is the salt storage house, isn't it? Isn't that true? A. Yes.

Q. And on the right-hand side of the picture there are two doors, are there not? I am pointing to them. A. Yes.

Q. And that is for the storage of salt, also, is it not? A. It is. [287]

Q. Now when you came out of this door, and Gerald designated that as being at this point "X", the right-hand side of the picture, where were these men, at what door were they loading salt from this car that you have talked about, this one where the white sacks are or one of these doors on the right-hand side of the picture?

A. One of these two, I'm pretty sure.

Q. On the right-hand side of the picture?

A. Yes.

Q. Now you came out of this door, you see the door there, you recognize this as the track, isn't that right? A. Yes.

Q. You made this left-hand turn?

A. Yes.

Q. And you are just a short distance from the end of the building, are you not? See the end of the building there (indicating)?

A. I don't know, there is nothing there, no picture of it.

Q. Well, taking a look at the whole structure that is shown in this picture, is there more of the building in this direction than is shown on the picture?

(Testimony of Allan Maine.)

A. There may be, I can't remember.

Q. Well, when you came out of the building at this point marked "X", you suggested you dump between the building and the south rail of Track 13, didn't you? You [288] thought it would be all right to dump there?

A. Well, no one there, so I figured we could, but under orders we weren't supposed to.

Q. Yes, it was your suggestion, and then it was Gerald's statement, "Well, we got orders to go to the other side of the track?" A. Yes.

Mr. McKevitt: That is all.

Redirect Examination

Q. (By Mr. MacGillivray): Allan, when you suggested to Gerry that you dump the ice south of the track, did you at the same time say anything about Mr. Fincher, about where he was?

A. No.

Q. Well, when you discussed that you dump south of the track, what did Gerry say?

A. He says, "We better not."

Q. Did he say why not?

A. Well, underneath there you are not supposed to be there when the trains are there on account of there is ice on top of the dock and falling ice could fall down on a person.

Q. Handing you, Allan, what is marked as Plaintiff's Exhibit 9, do you see any loose large chunks of ice on [289] the edge of that icing dock?

A. Yes.

(Testimony of Allan Maine.)

Q. In how many places down that dock?

A. Almost all the way.

Q. And was that the condition that was prevalent out there on that dock at all times, whether they were actually icing cars or not, that you had loose pieces of ice on the edge of that dock?

Mr. McKevitt: I object to the form of the question, your Honor. I think he is confined to what the condition on the top of the dock was on that date.

Mr. Etter: That is what he asked him.

Mr. McKevitt: No——

The Court: Overrule the objection, he may answer.

Mr. MacGillivray: Read back the question, please.

(The question was read.)

A. Most of the time, yes.

Q. And during your five days there, did you ever see large pieces of ice fall off the edges of that dock? A. Quite often, yes.

Q. And were you given instructions about walking underneath that dock on either the north side or the south side? A. Yes, we were.

Q. What were your instructions? [290]

A. That we weren't supposed to walk underneath or by this dock on account of this ice. There may be someone up there just walking along, they could push it off. I mean, not to have it on the dock, anyone walking along the side, it would fall down.

Q. Was that the reason given to you why you

(Testimony of Allan Maine.)

shouldn't walk along either side of that dock, that ice might fall on your head? A. Yes.

Mr. MacGillivray: Now, Mr. McKevitt, do you have that statement you had marked as an exhibit?

Mr. McKevitt: Yes.

Mr. MacGillivray: The original?

Mr. McKevitt: Yes.

Mr. MacGillivray: And do you have the second statement, the original of it?

Mr. McKevitt: Yes.

Q. (By Mr. MacGillivray): Mr. McKevitt asked you if some railroad claim agent was not out to see you on July 18, 1952 and you stated there was and you signed a statement marked as Defendant's Exhibit 17, is that correct? A. Yes.

Q. And then do you recall, Allan, that on August 7th about, oh, say two and a half to three weeks later, that that same gentleman was out and had you sign another [291] statement?

A. I don't recall him coming out at all.

The Clerk: Marked as Plaintiff's 18 for identification.

Q. (By Mr. MacGillivray): When this happened and when the gentleman came out on the 18th of July, that was the day after Gerry had had this accident and you had seen what had happened to him? A. Yes.

Q. And you were 16 years of age at that time?

A. Yes.

Q. Were you still kind of scared at that time from what you had seen the night before?

(Testimony of Allan Maine.)

A. I was scared a long time afterwards.

Q. Well, handing you what is marked as Plaintiff's Exhibit 18, is that your signature, Allan?

A. Yes.

Q. And do you now recall a railroad man being out and taking a statement and probably later coming out and having you sign it and you did sign it?

A. If I signed it, that is it, then.

Q. And you think you probably read it before you signed it? A. I believe so.

Mr. MacGillivray: I ask the admission, your Honor, [292] of Defendant's Exhibit 17 and Plaintiff's Exhibit 18.

Mr. McKevitt: If your Honor pleases, my interrogation of Mr. Maine with reference to the first statement had to do only with his testimony with reference to lights. That's all I asked him about.

Now if there is anything in the subsequent statement, the one in August, about lights, I will have no objection. Is there, Mr. MacGillivray?

Mr. MacGillivray: Your Honor, I submit that when Mr. McKevitt goes into a part of a conversation had with a railroad claim agent and a part of a statement made to a railroad claim agent, that we are entitled to have the full statement in.

The Court: Well, I think they should be admitted, both of them.

Mr. McKevitt: Very well.

(Testimony of Allan Maine.)

(Whereupon, the said statements were admitted in evidence as Defendant's Exhibit No. 17 and Plaintiff's Exhibit No. 18.)

Q. (By Mr. MacGillivray): All right, Allan, do you remember on July 18, 1952, when this railroad man came [293] out, did you not tell him this and sign a statement to this effect:

"Statement of Allan Maine, Age 16, single——"

Mr. McKevitt: I desire the record to show it is not proper redirect examination. I didn't go into this statement of August 18th with him at all or anything in it.

Mr. MacGillivray: I am talking about the statement of July 18th.

The Court: Well, I think that is probably proper use of the exhibit. You can read it to the jury if you wish to, read all of it, or any part of both exhibits, now that they have been admitted. If you omit any part, then Mr. McKevitt may read the rest of it.

Mr. MacGillivray: Well, then, may I read the whole statement, your Honor?

The Court: Yes.

Mr. MacGillivray: (Reading)

"July 18, 1952.

Statement of Allan Maine, age 16, single, car icer, Addison-Miller Co., there several days only, address E3634 Queen, phone GL-8766, made in connection with personal injuries of Jerry Stintzi, icer, at Yardley, Wash., July 17th, 1952, at about 9:00 p.m., dark, clear and fair weather. [294] Stintzi and I

(Testimony of Allan Maine.)

had been instructed by Foreman Fincher to carry out slush ice from the pit inside the building and throw it on the ground north of the track next north of the ice dock. We had carried out about fifteen or more loads of slush. We used a large metal bucket, or pail, with a handle on it, like a coal bucket. The bucket was suitable for the work we were doing with it. Just us two on that slush-carrying job there. There were ice cars standing on that dock track. There were cars on the track west of the door we worked out of, and I could not see the west end of that string. We carried the bucket by the handle, between us. When the accident happened, Stintzi had crawled under the couplers between two freight cars, and I had passed the loaded slush bucket over to him, and he had dumped it out on the ground, and was passing the empty bucket back to me, passing it under the couplers. I had just reached for the empty bucket, when the crash occurred. I heard a loud noise, when the end of the car on my left-hand side hit me. It hit me in the *cae,* and I grabbed the bar which operates the couplers. I was dragged about thirty yards, almost as far as Stintzi was dragged. I suffered [295] bruises on the head. I am going to see Dr. Brown, Deaconess Hospital. I have no other injuries. I got out from between the cars before they finally stopped. The crash was louder than anything I had ever heard before. They really hit the cars that time. We had not been warned by our foreman, or by any switchman, and there were no lights to

(Testimony of Allan Maine.)

warn Stintzi and I that the cars were going to be coupled into and moved. The violence came from the west. I ran west, trying to get the train stopped. I called to Idaho Davis to get the train stopped. I climbed over the couplers to reach Stintzi, who had been pulled from the track rail. I could see the leg was torn off. He made no statement how it happened. Overhead on the dock, electric lights, and I understand that the switchmen are not to move the cars we are working on until it is clear. Account I can't see the blue lights from where we were working, I don't know if they were burning, or not. I think our Foreman at the ice dock is supposed to turn on those lights when we are working on the cars there. I believe the cause of the accident was carelessness in not having the lights turned on when we worked there. We had been told the blue lights overhead protected us there. [296] Stintzi had been doing his work there in normal manner, and apparently feeling good. There is nothing further that I can add to this statement. I am unable to state names or numbers or descriptions of the cars we were working between with the slush bucket.

"I have read the above and it is correct.

(Signed) Allan A. Maine

Witnesses: A. C. Thomsen."

Statement of August 7, 1952: (Reading)

"Statement of Allan A. Maine, age 16, single,

(Testimony of Allan Maine.)

unemployed, high school student, address E 3634 Queen, Spokane, Wash., made in connection with personal injuries of Gerald R. Stintzi, icer, Addison Miller Co., Yardley, Wash., July 17th, 1952.

"Foreman Fincher gave Stintzi and I only the one set of orders, or verbal instructions, before we started to carry out the slush from the pit and dump it north of the ice dock track. Foreman Fincher did not come back to where we were carrying the slush after he gave those orders. Just when Stintzi and I started carrying out slush I [297] suggested to him that we could dump the buckets of slush right along north of the dock—between the ice dock and the cars standing on the north track there. Stintzi just declined the suggestion by saying he didn't think the foreman would like our dumping the slush next to the dock. So, to carry out our orders from the foreman, we dumped the slush north of the cars. I know the track was blocked with cars, but I can't say how many cars were west or how many cars were east of the door where we came out with the buckets of slush. Aside from being quite a distance to carry the heavy buckets of slush east of the doorway to go around the ends of the string of cars, that path was more or less blocked by a low removable platform from the dock to the salt car, or rather, between the salt car and the salt house located on the dock. That platform was pretty low, making it quite difficult, if not impossible, for Stintzi and I to carry the buckets under the platform. We proceeded to pass the

(Testimony of Allan Maine.)

bucket under the couplers, between the ends of two freight cars. Any claim or statement by Foreman Fincher that he told Stintzi and I not to crawl or go under the cars with the slush bucket, would not be correct. He gave us [298] no such orders. I know there were several freight cars on the track, and I know they extended eastward beyond the salt house. I know of no reason why the slush could not have been dumped next to the ice dock, instead of north of the track as ordered by Foreman Fincher. I have been attended for head injuries by Dr. Maris, of Spokane, Washington. I have not recovered from my injuries, and my injuries seem to have affected by vision. I have not worked since the accident happened.

"I read the above and it is right.

(Signed) Allan A. Maine

Witnesses: A. C. Thomsen."

Q. (By Mr. MacGillivray): Now those are the two statements that you gave to Mr. Thomsen, is that correct? A. Yes.

Q. Now when you spoke of blue lights, Allan, in the statement to Mr. Thomsen, to what lights did you have reference?

A. Well, at the east end of the dock, at the very end, there is poles run across and there is lights across there.

Q. Are they blue lights, as you recall? [299]

(Testimony of Allan Maine.)

A. I don't know if they are blue, what color they were.

Q. Prior to the time of Gerry's accident, had Mr. Fincher, or any foreman of the Addison Miller Company, given you any instructions with reference to blue lights?

A. No one of the company ever, no, never give us any.

Q. After Gerry was injured, the night that he was hurt when you all got up on the dock, was there then quite a bit of discussion about blue lights? A. Yes, there was.

Q. Allan, you now know that there are two blue lights on the little shed at the west end of the icing dock? Do you know that now? A. Yes.

Q. When did you first see those two lights?

A. In those pictures there.

Q. Well, when was that?

A. In your office.

Q. When?

A. Last week, Monday or Wednesday.

Q. Sometime last week? A. Yes.

Q. And if you would stand down here, Allan, please, and in Exhibit No. 8 would you show the jury the two lights at the west and in the shed or on the shed at the west end of the dock which you first saw in these pictures last [300] week?

A. Right there (indicating).

Q. Had you ever seen those lights when you were working during this course of five days?

(Testimony of Allan Maine.)

Mr. Etter: Counsel, would you show these other jurors, too?

Mr. MacGillivray: Oh, I'm sorry.

Q. Would you come down here, please, Allan? The blue lights on the shed at the west end are the ones you are pointing to on Exhibit No. 8.

You can go back, Allan.

Had you ever seen those two lights on that shed at the west end of the dock during the time you were actually working there? A. No.

Q. Then, Allan, as you say in this statement, when you suggested to Gerry Stintzi that you could dump that ice between the cars and the ice dock, why did you make that suggestion, to save yourself some steps or for any purpose?

A. Just save some time and work.

Q. To save yourself some work?

A. Yes.

Q. And at that time, Gerry said, "We can't do it, we have got to follow orders?" [301]

Mr. McKevitt: This is repetition.

The Court: Yes, I think it is repetition.

Mr. McKevitt: And counsel is testifying.

Q. (By Mr. MacGillivray): Then, Allan, whether it was because of anything you had heard of blue lights or because of some other reason, did you at all times feel that you were protected while working in, on, or about cars on either Tracks 12 or 13?

Mr. McKevitt: I object to this as leading and suggestive, your Honor.

(Testimony of Allan Maine.)

The Court: I think it is, I will sustain the objection.

Q. (By Mr. MacGillivray): Allan, do you know what happened to this platform that was extending between the salt car and the salt pit that the boys were unloading salt over?

A. Well, when the train moved, well, it kind of shifted around like that (indicating) and fell down.

Q. Do you know whether anyone was on or walking across that platform when the crash came?

A. No.

Q. Did you see anybody on the ground under that platform after the crash? A. No.

Q. Do you know who you heard hollering in the salt car? [302] A. No, I don't.

Q. And from the time Mr. Fincher gave your group of John, the Canadian, Vallarano, Stintzi and yourself your instructions on the top of the dock, did you then see Fincher between that time and the time that Gerry was injured? A. No.

Q. When is the next time you saw Fincher?

A. When I went back up on the dock to tell him of the accident.

Q. That was after the accident had occurred?

A. Yes.

Q. And did I understand you didn't work out there any more after that?

A. When I went up to the top of the dock, I told him he could have his job.

The Court: He said he quit, he didn't work after that. That is repetition.

(Testimony of Allan Maine.)

Mr. McKevitt: I object to this, your Honor.

Mr. MacGillivray: That is all.

Recross Examination

Q. (By Mr. McKevitt): Referring to Plaintiff's Exhibit 9 that Mr. MacGillivray showed you, Allan, and these chunks of ice that you [303] observed there, are those salt bags? (Indicating)

A. Yes.

Q. Ice? (Indicating) A. Yes.

Q. Salt bags? (Indicating) A. Yes.

Q. And so on, clear to that end, is that right?

A. Uh-huh.

Q. What kind of cars are these (indicating)? Refrigerator cars, aren't they?

A. I don't know. This one doesn't look like a refrigerator car.

Q. What track are they on, 13 or 12? 12, are they not, on the south side?

A. This is leading east, isn't it?

Q. Yes.

A. This would be on the south side.

Q. That is the south side, isn't it?

A. Yes.

Q. It is a fact, is it not, that the only time that you have ice such as is shown on the south side of that dock and salt as is shown strung along the whole length, is when cars are in there for the purpose of being iced right at that time; isn't that true?

A. Well, it could have been on there from the

(Testimony of Allan Maine.)

crew before [304] and it could have been on the crew after, whenever this picture was taken.

Q. You do not mean to say in the month of July they were leaving big chunks of ice standing out on the platform under the sun, do you, with no cars to be refrigerated?

A. They are not going to put it back.

Q. My question was, the only time that they have ice on that platform was when they have cars there to be iced, isn't that true? A. Yes.

Q. All they have to do is start this conveyor belt, it comes up from the ice house, you pull the ice right off the belt; isn't that correct?

A. That is correct.

The Court: Any other questions of this witness?

Mr. MacGillivray: Yes, that is all.

The Court: You say there are none?

Mr. MacGillivray: No further questions.

The Court: All right, you may be excused, then. Call the next witness.

Mr. MacGillivray: Mr. Vallarano. [305]

JOE VALLARANO

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. MacGillivray): Your name is Joe Vallarano? A. That's right.

Q. And where do you live, Joe?

(Testimony of Joe Vallarano.)

A. 3707 North Division.

Q. Are you married? A. Yes.

Q. Do you have a family?

A. Two children.

Q. And where are you employed?

A. I am a roofer by trade.

Q. For what company? A. Snyder.

Q. Snyder Roofing Company? A. Yes.

Q. And how long have you worked for Tom Snyder?

A. I have worked with him all this year.

Q. Mr. Vallarano, on July 17, 1952, were you employed by Addison Miller Company when Gerry Stintzi was injured? A. That's right.

Q. What work were you doing there? [306]

A. Icing cars.

Q. How long had you been working prior to that night?

A. Well, six or seven days. It was either six or seven days that I had been there.

Q. And during that six or seven days, what kind of work did you do, Joe?

A. Icing cars, icing cars on the dock.

Q. Pardon? A. Icing cars.

Q. Did you do any unloading of salt?

A. Pardon?

Q. Did you do any salt unloading?

A. Yes, I did, yes.

Q. What shift did you work? A. 3 to 11.

Q. Did you work any other shift or that shift each day? A. That shift.

(Testimony of Joe Vallarano.)

Q. Did you have some other job at the time?

A. At the time, what do you mean? Yes, I was roofing at the time, but it was between one of those jobs and I was working there during the evenings picking up a few bucks on the side.

Q. I see. Do you remember young Gerry Stintzi?

A. Very well.

Q. And you remember young Allan Maine?

A. Yes, I do.

Q. Now on the 17th of July, about what time did you come to work? A. 3 o'clock.

Q. Do you recall what you had done between 3 o'clock and when you went to supper?

A. Well, I think we iced a fruit train that come in between 3 and 7, and then around 7 o'clock we went to dinner.

Q. About 7 o'clock you went to dinner. Now going back two years, but the cars that you iced between 3 and 7, do you remember whether that was on the south side of the dock or the north side of the dock?

A. I don't know whether it was on the south or the north.

Q. It might have been both sides?

A. That's right.

Q. And that was a pure icing, car icing operation? A. Yes.

Q. And in that icing operation, you take the ice off the chain on the top of the dock, slide it across a platform to the top of the car, drop it down into the car, and then chop it up?

(Testimony of Joe Vallarano.)

A. That's right.

Q. When the car is full, you salt it and go on to the next car. Where did you have your supper that night, do you recall? [308]

A. Right down by the main office. It is right down there by the big ice house, this side of the tracks.

Q. What did you do, bring your own lunch?

A. No, there is a little grocery store up the road about three or four blocks and I had went up there with Tarnaski, the fellow from Canada, and we would buy our lunch and then come back and eat it. That is where all the fellows ate their lunch, mostly all of them.

Q. And when you got back at 7 o'clock, where did you go and how did you get back to the icing dock?

A. Well, after we got through eating, we went into the tunnel, then back up to the icing dock.

Q. When you got back up on the icing dock, were you given any instructions as to what you should then do?

A. Well, Fincher was right up there from the tunnel as we came up to the main dock, and he told—I guess he told Gerry there to take four or five men—I was there and I heard him—he told him to take four or five men and go down below and clean the slush out from on this power belt, because as it makes a turn it chops off the ice, you know, these big cakes, he told us to go down there.

Q. And then did Gerry pick a crew?

(Testimony of Joe Vallarano.)

A. Yes, he did.

Q. Who did he pick, as you recall?

A. There was Tarnaski, me and Maine and him.

Q. Now is it Tarnaski, was that his name?

A. Tarnaski, I guess that was his name.

Q. T-a-r-n-a-s-k-i, that is the way it sounds?

A. Yes, that sounds like it.

Q. You don't remember what his first name was?

A. No, I don't.

Q. Was he an American?

A. He was a Canadian.

Q. He was a Canadian. How old a fellow was he? A. I imagine he was 42, 43, 45.

Q. And after Gerry picked the three or four of you, did Fincher then give the group, the four of you, any instructions as to how and where you should dump that ice?

A. He told us to go down there, there was a 5-gallon drum down there, 5-gallon pail, there was a shovel, he told us to shovel the ice and put it in the pail and take it across the tracks and dump it over in the rubbish pile.

Q. And that would be across what track, on which side of the dock? A. The north track.

Q. And north of the north track you refer to a rubbish pile? A. That's right.

Q. Did you know about that rubbish pile at the time? [310] A. No, I didn't.

Q. Well, how do you refer to it now as a rubbish pile?

A. Well, at the time when I was down there,

(Testimony of Joe Vallarano.)

I seen they had burned a bunch of stuff there and they had dumped a bunch of stuff, so I figured it was a rubbish pile.

Q. Looked like a rubbish pile or a common dumping ground? A. That's right.

Q. And is that the rubbish pile, or seems to be a dumping ground, shown in——

A. That is it.

Q. ——in Exhibit No. 14?

A. That's right.

Q. And that is immediately north of Track 13 we have been talking about and between Tracks 13 and 14 to its north? A. That's right.

Q. And then what did the four of you do after you got your instructions from Fincher?

A. Well, we went down below, and I think I took a couple of loads with Maine and then I might have took a couple of loads with Gerry. We retaliated, we had turns. And then when Gerry was hurt, I know that me and this Canadian was down shoveling the ice and lifting it up, giving it to them.

Q. In other words, who was down filling the buckets in the [311] slush pit?

A. Tarnaski and I.

Q. And then did you carry any buckets out and get them across the track?

A. Prior to the accident, yes.

Q. Yes. How many?

A. I don't know offhand, I couldn't say. I imagine I carried a few.

(Testimony of Joe Vallarano.)

Q. It might have been a couple with Gerry and a couple with——

A. Four or five, maybe six.

Q. When you did that, Mr. Vallarano, did you stay on the south side of the coupling between the cars, or did you go through the coupling?

A. No, I went through, I think, once or twice because I remember what the rubbish pile looks like. I went through, I think, when me and Tarnaski brought it over. I handed it over, I climbed under the couplings, and then I took it over and dumped it.

Q. Now the first time you walked out of the doorway there, whether it was with Stintzi or whether with anyone, carrying this bucket, did you see a line of cars there? A. Yes.

Q. Do you know, Joe, how far they extended to the west?

A. I knew they were quite a ways, there must have been [312] quite a few cars, because I didn't feel like I wanted to carry that pail all the way up around them.

Q. Do you know how far they extended to the east?

A. I think there might have been quite a few to the east, too.

Q. How heavy was this pail when it was full of slush?

A. It must have been 25 pounds, maybe 30, 40. I imagine 25 or 30 pounds.

Q. I see. And was there any other practical way

(Testimony of Joe Vallarano.)

to get that pail full of slush over to the north side of Track 13 and dump it in accordance with your instructions except to go through the coupling?

Mr. Cashatt: I object to the form of the question, your Honor.

The Court: I think it does call for a conclusion. You can ask him how he would have to dump it if he didn't go through.

Q. (By Mr. MacGillivray): Well, how did you fellows happen to use the coupling to go between the cars in order to get to the north side of Track 13?

A. Well, one of us would have to crawl under; he would get on the other side; then the one on the south side of the track would swing it under the coupling to him, and then he would take it over and dump it.

Q. Well, how did you happen to decide to go through the [313] coupling?

A. Well, that is the only way we could get through there to dump the rubbish.

Q. And in doing—— A. I mean the ice.

Q. And in doing that, were you following out what you understood to be Foreman Fincher's instruction? A. That's right.

Mr. Cashatt: I object to that and move it be stricken. There is no evidence here that Fincher ever instructed him.

The Court: Well, I will let it stand. It is leading but it has been said by others.

Q. (By Mr. MacGillivray): How long, Mr. Val-

(Testimony of Joe Vallarano.)

larano, if you recall, had you been engaged in this slush operation before the accident happened?

A. Oh, I don't know, maybe a half hour, three-quarters of an hour, possibly an hour.

Q. Do you know how many buckets of slush had been carried out and dumped and carried back?

A. No, I couldn't say exact.

Q. What time of night was it, as you recall, when the accident happened?

A. I think the big lights were on.

Q. Pardon? [314]

A. I think the big lights was on. It must have been close to about 8:30.

Q. About 8:30. And what was the visibility outside? Was it daylight, dusk or dark? A. Dusk.

Q. And where were you, Mr. Vallarano, when you heard the crash and the accident occurred?

A. Into the slush pit.

Q. In the slush pit? A. Yes.

Q. You were in the building itself, then?

A. Yes.

Q. Well, just tell the jury what you heard and what you did.

A. Well, Stintzi and this boy Maine had tooken out the pail and then I heard these cars banging together and then I heard Stintzi screaming. He must have screamed maybe four or five times, I couldn't say for sure, so I knew that somebody must have got hurt, and I ran up the stairs and ran up the main dock, right up to the top of the dock, and I jumped from the dock on to the cars.

(Testimony of Joe Vallarano.)

They were still running, but they were just slowing up. And I looked on the other side of the cars down, you know, down below——

Q. Not so fast now. You ran up on to the dock?

A. Yes.

Q. To the top of the dock? A. Yes.

Q. Is there a stairway leading from where this slush pit is up to the top of the dock?

A. Yes, there is, that is the main stairway.

Q. And then when you got on the top of the dock, what did you do?

A. I jumped on to the cars.

Q. On top of one of the cars? A. Yes.

Q. And was that car still moving?

A. It was going slow, yes.

Q. And then what happened?

A. Then I looked over, and from the time I jumped from the dock on the car, the car was going slow and it stopped, and I looked over on the other side of the car down below and there was Gerry laying down there. He had been, I guess, thrown.

Q. Tell the jury what you saw down there.

A. Well, I saw him lying down there, his head was facing north and his leg was completely off up here at the hip, and his—well, you know, it is hard to explain, looked awful, I know that, and I heard him moaning and screaming down there, and that is about it. [316]

Q. Well, then what did you do?

A. So I guess some fellows up on the dock didn't even know what had happened, and then I ran

(Testimony of Joe Vallarano.)

back down through the tunnel, I ran up to the main office of Addison Miller, and I phoned up the Emergency Hospital here in town and I told them I would wait out by the main road right there in front of the big ice house and I would wait for them and I would give them directions showing them how to get in there. And so I was waiting there, two cars, the County Sheriff had got there and then the city ambulance from the police station had got there, too, about the same time, so I jumped in with the city ambulance and we went up some road, I don't know, over the bridge leading over to Trent, then we came back and they couldn't get in because there was so many cars, you know, in the way there. So I took this intern, a doctor, and brought him back, brought him to where Gerry was. We ran in between the cars and got back there where Gerry was laying.

Q. And was Gerry still there on the ground beside the car? A. Yes.

Q. What was his condition then, Joe?

A. Looked very bad.

Q. What was he doing?

A. He was praying at the time. I think some other fellow [317] was holding him. He thought his arms were cut off, he kept on repeating that he had lost his arms, and he was praying, wanted to see his dad. I don't recollect too well, he wanted to see his dad or his mother, he wanted them right away.

Q. And he was praying, did you say?

A. Yes, he was.

(Testimony of Joe Vallarano.)

Q. And was the doctor or intern with you at the time?

A. Yes, the doctor, the intern, I imagine, I think it was the intern, was right there with me at the time.

Q. Was Gerry bleeding a lot?

A. Oh, bleeding, boy, you know it. His leg was — I think there must have been just about two or three inches of skin that was holding his leg. It was completely severed from his bone. His bone was sticking out of his hip, you know, socket bone about that long (indicating) sticking out. The leg was completely turned over to the side and he had rocks and gravel in his face and in his side, his arms.

Q. Did you notice his right arm?

A. They were both broke, I think. He thought they were both cut off, he thought he had lost them.

Q. How about his left leg?

A. His left leg? Didn't notice that too much, the only thing I noticed was his right leg, the one that was gone. [318]

Q. I presume he was in considerable pain?

A. I didn't think he had a chance.

Q. Was he conscious?

A. Yes, he was conscious.

Q. Now you had worked there about six or seven days?

A. Yes, I guess it must have been about that, I imagine, it might vary a day or so.

Q. I think I asked you, I forget whether I

(Testimony of Joe Vallarano.)

asked you or Allan, did you work that same 3 to 11 shift? A. Yes.

Q. Now, Mr. Vallarano, at any time during that 7-day period, when there were cars spotted and standing on either Tracks 12 or 13 and any of the Addison Miller crew was working on the dock, in, on, or around those cars, had you ever seen cars come drifting in unattended from east or west on either Tracks 12 or 13?

Mr. Cashatt: I object to that question, your Honor, as leading and to the form of the question.

The Court: Well, overruled, he may answer.

A. Well, I don't know, I can't say about that.

Q. (By Mr. MacGillivray): Well, had you ever seen it to your recollection? A. No.

Q. And, Mr. Vallarano, when you carried out the slush bucket with either Stintzi or Maine and crawled under [319] the coupler yourself, did you expect that any of those cars standing there would be moved?

Mr. Cashatt: I object to that.

The Court: Yes, I will sustain the objection.

Q. (By Mr. MacGillivray): Do you recall the string of lights on the top of the icing dock?

A. Yes.

Q. Have you seen these pictures?

A. No.

Q. Handing you what is marked as Plaintiff's Exhibit No. 9, which is a picture taken on the top of the icing dock looking from the westerly little shed in an easterly direction, do you recall that?

(Testimony of Joe Vallarano.)

A. Yes.

Q. Do you recall those overhead lights?

A. Uh-huh.

Q. Down the north and south sides of the dock?

A. Yes.

Q. Were those lights illuminated when you ran up on the dock and jumped from the dock over on to that moving car?

A. I think they were on, yes.

Q. Well, are you sure they were on?

A. Pretty sure, yes.

Mr. Cashatt: What is the exhibit number? [320]

(Exhibit 9 handed to Mr. Cashatt.)

Q. (By Mr. MacGillivray): And, Mr. Vallarano, when you were working down there in that ice pit and out adjacent to Track 13 and even across Track 13, did you at any time then have any reason to anticipate that any of those cars would be moved?

Mr. Cashatt: I object to that.

The Court: I will sustain the objection on that.

Mr. MacGillivray: You may examine.

Cross Examination

Q. (By Mr. Cashatt): Now, Mr. Vallarano, you say you had worked there for six or seven days? A. Yes.

Q. And had most of that work been on the ice dock itself? A. Most of it, yes.

Q. And when you were up on the ice dock, Mr.

(Testimony of Joe Vallarano.)

Vallarano, you could see practically the entire switch yard, isn't that correct?

A. That's right.

Q. If you looked to the north, you could see the general yard as far as it goes to the north, couldn't you? A. Yes, that's right.

Q. And you can look to the south and see the general yard [321] as far as it goes to the south?

A. Yes.

Q. The same is true of the east and the same is true of the west, isn't it? A. Yes.

Q. Now while you were there those six or seven days before this accident happened, you saw switch engines moving cars fom one place to the other in that yard, didn't you? A. Yes.

Q. And you saw switch engines bringing cars down the main and cars being uncoupled and cars drifting down the certain switch tracks, didn't you?

A. That's right.

Q. That was a common practice out there, wasn't it? A. Uh-huh.

Mr. MacGillivray: Speak up, Joe. A. Yes.

Q. (By Mr. Cashatt): It was a common practice on all of the tracks in that Yardley switch yard, wasn't it?

A. I wouldn't say all of them; I don't think it was a common practice on 13 or 14, whatever those two rip tracks were along that loading dock.

Q. Well, say, Mr. Vallarano, when there were no cars in there for icing and being iced on 12 or 13, you have [322] seen them switch cars, just gen-

(Testimony of Joe Vallarano.)

eral freight cars, unloaded boxcars, tankers, and so on and so forth, you have seen them switch those in on 12 and 13, haven't you?

A. No, I haven't, not on 12 or 13.

Q. How much time did you put in on those six or seven days out on that icing dock?

A. When there wasn't no ice cars back up there to ice, used to go back to the main icing shed, sit there in the shed, sit there for two or three hours at a time. When a fruit car came in, come back up to the dock.

Q. On an average on an 8-hour shift, how many hours did you usually spend during those six or seven days out on the icing dock itself?

A. Well, it all depends on how many fruit cars come in.

Q. Well, on the average?

A. Well, I couldn't say.

Q. Four hours?

A. Might have been four, maybe five. I know we done a lot of loafing, too.

Q. Yes, but my question was approximately how much time did you spend on the icing dock?

A. Well, I couldn't say for sure.

Q. Well, would it be fair to say an average of four to five hours a day out on the dock itself?

A. That might be it.

Q. And when you were out on that dock, what would you hear, what was the general noise that you could hear throughout that yard?

(Testimony of Joe Vallarano.)

A. Well, you could hear those engines being switched.

Q. You could hear the switch engines at work, could you? A. Yes.

Q. And you could hear one car bumping in and coupling to another car, couldn't you?

A. That's right.

Q. In fact, you hear that just constantly out there, don't you? A. That's right.

Q. In fact, you hear it so much it is practically the rhythm of that yard, isn't that right?

A. Right.

Q. And one couldn't be out in that yard on that ice dock over five minutes without being very familiar with that particular sound, could you?

A. I guess that's right, yes.

Q. Well, that is right, isn't it, sir?

A. Yes.

Q. And when you hear that sound, you know that boxcars are being pushed down tracks and that they are coming in contact with other freight cars? [324] A. That's right.

Q. That is what you know, isn't it?

A. Yes.

Q. And whatever you call it, oh, say, at times, Mr. Vallarano, just throughout all of the time like when you were on this dock four or five hours a day, you could see cars stationary on these various tracks, couldn't you, you could see them sitting?

A. That is correct.

Q. Freight cars? A. Yes.

(Testimony of Joe Vallarano.)

Q. And then you would see single cars or one or two cars being rolled down the track and bumping into those stationary cars?

A. That's right.

Q. You saw that, didn't you? A. Yes.

Q. And you saw that same thing on Track 13 when cars weren't being iced on that track?

A. I never seen that on Track 13.

Q. Did you see them make up trains there practically every day, the trains that were going to be pulled east?

A. I didn't watch to see them make up trains. I knew that they were doing a lot of switching out there, though.

Q. And now as far as this particular night is concerned, [325] Mr. Vallarano, when you got down to the area where you were taking this slush out of the pit, who was the first one that went across Track 13 with a bucket of this slush?

A. Can't say for sure.

Q. You don't know, sir, whether it was you?

A. It might have been me, might have been Stintzi, might have been either one of us.

Q. At any time, Mr. Vallarano, did you go across that track under those couplings yourself?

A. Yes.

Q. Are you sure of that?

A. Positive of it.

Q. How many times did you go under those couplings yourself?

A. I wouldn't ask how many times I went under,

(Testimony of Joe Vallarano.)

but I know I must have went under two or three times, maybe four.

Q. That particular night?

A. That was the only night that I ever dumped slush, yes.

Q. That was the only night that you ever dumped slush? A. Yes.

Q. Do you remember giving a statement to Mr. Thomsen, the claim man of the Northern Pacific Railroad, on July 18, 1952, the day after this accident occurred?

A. Yes, I think I did, he came up to my place and took a [326] statement.

The Clerk: Defendant's 19 for identification.

Q. (By Mr. Cashatt): Handing you Defendant's Exhibit No. 19 for identification, Mr. Vallarano, is that your signature, sir, on Page No. 1?

A. Right here (indicating).

Q. Will you please look at it?

A. Yes, that is my signature.

Q. And on Page No. 2, would you please see if that is your signature? A. Yes.

Q. And is the other statement right above your signature in just writing, "I have read the above statement and this is the truth (2 pages)," is that your writing there, sir? A. Yes.

Mr. Cashatt: I will offer Defendant's Exhibit No. 19 and be glad to read the entire statement to the jury.

Mr. MacGillivray: No objection.

Mr. Etter: No objection.

(Testimony of Joe Vallarano.)

Mr. Cashatt: Or just the parts that are material.

The Court: It will be admitted. [327]

(Whereupon, the said statement was admitted in evidence as Defendant's Exhibit No. 19.)

Q. (By Mr. Cashatt): Mr. Vallarano, in that statement that has now been admitted in evidence, do you remember making the following statement to Mr. Thomsen, the Northern Pacific claim man:

"I never did go under the couplers, but went right up to the couplers to hand the bucket to Stintzi on two occasions before the accident and while during this time and while doing this work, I depended upon the fact that I thought these cars were frozen by blue light as was the usual custom when men worked about the cars."

Do you remember making that statement?

A. It has been two years ago, I don't think I remember, but I know that I went under that coupling.

Q. Well, now, Mr. Vallarano, you think that your memory would be better today as to that fact than it would have been on July 18, 1952, the day after the accident?

A. Well, I don't remember a lot of things that happened two years ago, if that is what you mean.

Q. I appreciate that, sir, but on this particular fact concerning this particular accident, don't you

(Testimony of Joe Vallarano.)

think that your memory the morning after the accident would be better concerning the facts of the accident than it would be today?

A. Yes, I do.

Q. Now, Mr. Vallarano, when you came up on the dock after this accident happened, I believe you stated that the cars were still in motion, is that right, sir? A. That's right.

Q. And when you did that, Mr. Vallarano, I believe when you got up to the dock you took a look to see if the blue light was out on Track 13 and to see whether or not it was on, is that right?

A. No, I didn't.

Q. You didn't do that, sir?

A. I did after they tooken Stintzi away. That might have been maybe three-quarters of an hour after that they were talking about the blue light being off.

Q. And you know that the blue light was not on at the time this accident happened?

A. I don't know whether it was on when the accident happened.

Q. Well, now, while the cars were still moving, you took a look to see whether or not the blue light was on? [329] A. No, I didn't.

Q. You didn't?

Mr. Cashatt: Your Honor, I would like to read the entire statement to the jury.

The Court: All right.

(Testimony of Joe Vallarano.)

Mr. Cashatt: (Reading)

"Spokane, Washington, July 18, 1952

"Statement of Joe Vallorano, age 30, address 120 E. Pacific, Apt. C, phone none, occupation iceman, employed since about July 7, 1952 by Addison-Miller Co., made in connection with injuries to Gerald Stinzi, iceman, Yardley, Wn., July 17, 1952 at about 8:15 p.m.

"I was working on the 3:00 p.m. to 11 p.m. shift at Addison-Miller Co. ice plant and ice dock at Yardley, Wn. on July 17, 1952. At about 6:30 p.m. we finished icing a fruit train on track 12 south of the ice dock and then we had lunch time for about an hour. Sometime during lunch time, the railroad put a number of cars in on track 13 and I don't know how many cars were put in on the track but it was a long string running quite a ways to the west from the ice dock. These were freight cars and were not refrigerator cars for icing. [330] After we returned to work after lunch at about 8:00 p.m. Fincher, the foreman, told four of us to stay and clean out the slush in the bottom of the ice dock. Stinzi, Maine, John Tornasky and myself were to do this work and Tornasky went down in the hole to pick up the slush and put it in the bucket, a 5-gal. bucket, and he would hand it up to me, and I would then hand it to Maine and Stinze and then they would carry it to the track and then one of the men would crawl under the couplers between two cars, freight cars, and then the other would

(Testimony of Joe Vallarano.)

hand it to him and he would dump it and then hand the bucket back and then the fellow would crawl back under the coupler and go to get another bucket full. Stinze and Maine and I traded off, two at a time, doing this work, and after we had done about 4 or 5 loads, ten or 15 minutes at the most, I was sitting in the doorway leading from the tunnel and Tornasky was in the ice dock and Maine and Stinze had gone to dump a bucketfull of ice. Stinze had gone under the coupler and Maine had handed the bucket to him under the coupler and the bucket was dumped by Stinze, I believe, and while he was handing the bucket back, as I understand it, I heard a loud [331] noise or coupling, which indicated a very violent joint, and the cars that had been sitting there rolled slowly to the east and they rolled about 35 or 40 feet and then stopped. I heard screams from someone and there were about 4 or 5 or 6 or 7 screams in all and then knew something was wrong so I ran to top of dock and onto top of cars and looked down and there saw Stinze lying on the north of the north rail of this track and he appeared badly hurt with one leg amputated or nearly off and after I went down about halfway on the ladder I knew he needed help in a hurry so I went back to ice dock, back through the tunnel and ran to the office and called the operator and asked for emergency help at the plant. I then waited at the office in order to direct help when it arrived. It was dusk at the time of accident and there were lights on top of the dock but these did not give

(Testimony of Joe Vallarano.)

much light to where we were working. The weather was clear and visibility good. Fincher told us when we started 'Clean out the slush and put it in a can and carry it across the track and dump it' and that is all he said and he did not say anything about how to go across the track. Since there was no break in string of cars on track, we went under [332] to dump the slush. It was my understanding while working there that when cars were on this track blue light on top of ice dock at west end would be lighted to warn switchman of men in cars and it was our impression that this light was lighted at time we were working cleaning out this slush and going across the track under the couplers of these cars on this track. We had no idea that there would be any cars coming in on this track. I know that just after the accident, when I ran up on the top of the dock that the blue lights on west end were not on and had not been on at time of accident as Stinze was still being dragged at time I went to top of the dock. I don't know why these lights were off but most likely they were not on while we were at lunch and no one turned them on again after lunch. I never did go under the couplers but went right up to the couplers to hand the bucket to Stinze on two occasions before the accident and while during this time and while doing this work I depended upon the fact that I thought these cars were frozen by blue light as was the usual custom when men worked about the cars.

(Testimony of Joe Vallarano.)

"I have read the above statement and this is the [333] truth (2 pages).

(Signed) Joe Vallorano

Witness to signature: Mac M. McGrew."

Q. And it is true, Mr. Vallarano, that when you gave this statement on July 18, 1952, that your mind at that time concerning this accident was fresher than it is at the present time, isn't that right?

A. I was pretty excited at that time, too.

Q. Yes.

Mr. Cashatt: That is all.

Redirect Examination

Q. (By Mr. MacGillivray): Mr. Vallarano, as I gather in this statement, you state that you didn't go under the coupler but you went right up to the coupler. Your recollection is now that you went under the coupler. Which is correct?

Mr. Cashatt: I object to that.

A. I went up to the coupler.

Mr. Cashatt: Cross examination of his own witness.

The Court: I will overrule the objection. You may state that.

Q. (By Mr. MacGillivray): Which is correct?

A. I went under it, both under it and up to it.

Q. Well, in going up to the coupler to hand the bucket through to whoever might have been on the other side, were you directly between two cars?

(Testimony of Joe Vallarano.)

A. Yes.

Q. Then, Mr. Vallarano, in the statement you state: "It was my understanding while working there that when cars were on this track blue light on top of ice dock at west end would be lighted to warn switchman of men in cars and it was our impression that this light was lighted at time we were working cleaning out this slush and going across the track under the couplers of these cars on this track. We had no idea that there would be any cars coming in on this track."

Is that correct?

A. That is correct.

Q. Did you at that time, in view of your knowledge of the blue light, think there was any danger in either going up to the coupler or under the coupler?

Mr. Cashatt: I object as calling for a conclusion.

The Court: Yes, I will sustain the objection to that. What his opinion was is not material.

Q. (By Mr. MacGillivray): Well, what did you mean by this, insofar as your own safety was concerned, when you made the statement: "We had no idea that there would be any [335] cars coming in on this track?"

Mr. Cashatt: Same objection, your Honor.

Mr. MacGillivray: I think he can explain this, your Honor.

Mr. Cashatt: The statement speaks for itself.

The Court: What was your question again?

(Testimony of Joe Vallarano.)

Mr. MacGillivray: I've forgotten. Would you read it, please?

(The question was read.)

The Court: All right, overruled, you may answer that.

A. Well, I took it for granted if they were working on top of the cars there, there wasn't going to be any cars sent in there; as long as they were working around the freight cars, that we were pretty safe.

Q. (By Mr. MacGillivray): How old are you, Mr. Vallarano? A. 32.

Q. Were you in the service? A. Yes.

Q. Now, Mr. Vallarano, before this violent crash and you heard Gerry start to scream, did anyone give you, Mr. Tarnaski, Mr. Stintzi, or Mr. Maine, any warning of any kind that cars were drifting in on Track 13?

Mr. Cashatt: I object to that. It is not proper redirect. [336]

The Court: Overruled.

The Witness: Do you want me to answer?

Mr. MacGillivray: Yes.

A. No, they didn't.

Q. And counsel asked you several questions about it being common practice out there to switch cars on different tracks and let them come into contact on other tracks; you said that was common practice?

A. Yes, I have seen that happen around there, around the yards.

(Testimony of Joe Vallarano.)

Q. Did you ever see that happen on either Tracks 12 or 13 when Addison Miller had a crew working on and about that icing dock?

A. No, I didn't.

Q. How many men were there, approximately how many men on one of these icing crews?

A. Couldn't say for sure, I never did count them.

Q. Well, I don't mean to be exact?

A. Well, I figure there was about 25 or 30.

Q. 25 or 30.

Mr. MacGillivray: That is all. [337]

Recross Examination

Q. (By Mr. Cashatt): Mr. Vallarano, counsel asked you about being in the service. Mr. Vallarano, isn't it correct that on September 19, 1944, that you were convicted of desertion from the service at Camp Wood, Texas and given five years?

A. That is wrong, it is not '44, it is '43.

Q. '43, sir? A. '42.

Q. '42?

A. That's right. But it wasn't desertion.

Q. What was it?

A. I got in a little trouble with a lieutenant.

Mr. McKevitt: First or second?

Q. (By Mr. Cashatt): Did you see anybody working on top of any of those cars while you were carrying out this slush operation?

A. No, I didn't.

Q. And I notice that counsel has not asked you whether or not you saw any salt being unloaded.

(Testimony of Joe Vallarano.)

Did you see any salt being unloaded there?

A. Well, I didn't notice any salt being unloaded, probably because I didn't look at the right where the salt bin was. [338]

Q. You didn't see any, anyway?

A. Well, I didn't look that way. I didn't see any salt, I seen the platform there, but I didn't see any salt going back and forth, guys walking back and forth, if that is what you mean.

Q. See any lights running from the salt pit to the boxcar or anything like that?

A. I don't remember that.

Q. Did you see any platform across there?

A. Yes, I think I seen a platform, I'm not sure.

Q. When did you see that?

A. When we were cleaning out the slush out of the pit.

Q. Well, after you had carried several buckets across the track, how long after you started cleaning out the pit did you see any platform over there?

A. I don't know, might have happened when I started to carry maybe the first bucket, the second.

Q. Where was that platform from where you were carrying out the slush, the door you were coming out of?

A. To the right, to the east of the door.

Q. And what kind of cars were on the tracks there, Mr. Vallarano, right in front as you came out of the door?

A. Couldn't say that. I think they were freight cars.

(Testimony of Joe Vallarano.)

Q. Were they cattle cars, sir?

A. Well, I don't know, they might have been freight cars. [339] I don't know whether they were cattle cars or not.

Q. And how far was the platform to the east from the place that you were coming out?

A. I don't remember that.

Q. Well, could you say it was one car length or two car lengths? A. Can't even say that.

Mr. Cashatt: That is all.

Mr. MacGillivray: That is all, Mr. Vallarano.

(Witness excused.)

Mr. Etter: Mrs. Boyle, please.

NORA BOYLE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Just be seated, Mrs. Boyle. It is quite difficult to hear here in this courtroom, all the jurors have to hear what you say, so will you speak up loudly so that I can hear what you have to say back here and then everybody can probably get it? A. Uh-huh.

Q. Will you state your name, please?

A. My name is Nora Boyle. [340]

Q. And where do you live?

A. I live at 1424 West 10th, Spokane.

Q. How long have you been a resident here in Spokane?

(Testimony of Nora Boyle.)

A. Oh, I would hate to say. It has been a long time, since I was a little girl.

Q. It has been over 15 years, hasn't it?

A. Oh, yes, it is over 15.

Q. What is your profession or occupation, Mrs. Boyle?

A. I am a graduate registered nurse.

Q. And you graduated from what school of nursing?

A. Sacred Heart School of Nursing.

Q. And you have been practicing your profession as a registered nurse for about how many years? A. Well, at least 30 years.

Q. For about 30 years? A. About.

Q. And have you maintained, I mean, quite a regular schedule of employment as a registered nurse?

A. Well, part of the years I was out of nursing, I was married. My husband passed away ten years ago, I went back in the nursing service again.

Q. You have been back in it constantly since that time? A. Ten years, yes.

Q. Ten years?

A. The last ten years. [341]

Q. Tell me, in your work, Mrs. Boyle, do you serve on any particular type of case?

A. I have served on practically every type of case.

Q. I see.

A. That comes into a hospital.

Q. And those cases include sicknesses, illnesses?

(Testimony of Nora Boyle.)

A. Sickness, accident.

Q. And all types? A. All types.

Q. I will ask you this, have you had a considerable bit of work on cases of an ill or injured classification where the case was particularly critical?

A. Well, yes, I have had, I have had accident cases that have been critical, but shall I say it, that in all my years of nursing, the case of Gerald Stintzi was the most serious one that I had ever nursed.

I took care of Gerald for about 9 weeks when he was most critical. I saw him at death's door. I have seen others just as ill as he and hurt, but they did not survive, they passed on. Gerry was one of the fortunate ones to have lived.

Q. You met Gerry Stintzi about a week or so, did you, after he came into the hospital?

A. Yes, I think it was five or six days after he came in. The nurse that was doing special duty with him had an [342] appointment with an office position and I took her place.

Q. Mrs. Boyle, during your work as a nurse and in cases in which you handled accident cases, have you had occasion to observe a great deal of pain and suffering? A. Oh, definitely.

Q. What is your opinion with respect to the case of Gerry Stintzi compared with other cases you have worked on?

A. Well, I think he suffered more——

Mr. Cashatt: Objection——

The Court: Just a minute. I don't think a com-

(Testimony of Ray Davis.)

Q. And are you working now? A. No.

Q. I think you just came back from Fort Lewis, didn't you? A. Yes.

Q. How long ago?

A. Ever since last Saturday.

Q. You came back last Saturday?

A. Yes.

Q. Now, Ray, you know Gerry Stintzi?

A. Quite well.

Q. How long have you known him?

A. About ever since I was a sophomore in high school.

Q. Were you in the same grade as Gerry in high school?

A. No, I was a year ahead of him.

Q. You were a year ahead of him. And did you engage in athletics in high school? A. Yes.

Q. What did you do?

A. I played football and a little basketball and baseball and track.

Q. And did you know Gerry as a freshman?

A. Yes.

Q. When he was a freshman. And was he engaged in athletics then? A. Yes. [346]

Q. And in his sophomore year?

A. In his sophomore year I knew him better.

Q. Better as a sophomore? A. Yes.

Q. Do you remember the evening he was hurt?

A. Quite well.

Q. July 17, 1952?

A. I don't know what date it was.

(Testimony of Ray Davis.)

Q. But you remember the night?

A. Yes.

Q. Now were you working at Addison Miller Company out at Parkwater or Yardley the night that Gerry was hurt? A. Yes.

Q. How long did you have a job out there, Ray?

A. About five or six days.

Q. Did you go to work the same day that Gerry did? A. Yes.

Q. Did the two of you apply for work together, or do you remember? A. Yes.

Q. Oh, you and Gerry went down together and got a job? A. Yes.

Q. And started out the same afternoon?

A. Yes.

Q. And did you always work on the same shift, this 3 to 11 [347] shift? A. Yes.

Q. Did you know they had other shifts other there around the clock? A. Yes.

Q. But you always worked on just the one shift, is that it? A. Yes, 3 to 11.

Q. How long had you worked, you and Gerry worked, as you recall, before he was hurt? How many days?

A. I couldn't give you no definite number.

Q. About a week or less than a week or more than a week?

A. Well, I would say at least a week.

Q. About a week. Now during that week, Ray, did you do everything out there, ice cars and carry out salt and salt cars, and so on? A. Yes.

(Testimony of Ray Davis.)

Q. Did you work any over in the ice plant, or was all your work out by the dock?

A. All my work was up on the dock.

Q. About how many fellows were there on this 3 to 11 crew, as you remember it?

A. Well, I couldn't remember.

Q. What were you, about 19 years old then?

A. Yes.

Q. Gerry was 17, remember? [348]

A. He was 16 or 17.

Q. Yes. Did you know Allan Maine?

A. Yes.

Q. Were there any other young fellows like Allan and Gerry working out there on the crew, or were most of them older?

A. Well, there was quite a few young guys out there.

Q. A bunch of kids and some older fellows?

A. That's right.

Q. Now on the evening that Gerry was hurt, do you remember buying a supper or lunch?

A. No, I don't remember going, no.

Q. Do you remember what time you had supper?

A. I would say at least about 8 o'clock.

Q. Pardon?

A. I would say at least at 8 o'clock, but I don't remember going.

Q. By 8 o'clock? A. Yes.

Q. Do you remember where you ate that night?

A. No.

Q. And do you remember, Ray, what you had

(Testimony of Ray Davis.)

done that day from 3 o'clock until you did go to lunch or supper?

A. No, not until I went in the salt pit.

Q. Do you remember, Ray, getting back after lunch and going [349] up on the dock?

A. No.

Q. Do you remember what you were doing at the time that Gerry was hurt? A. Yes.

Q. What were you doing?

A. Oh, we had took about a 10 minute break and I was standing out between the salt pit and the boxcar. That is when the cars hit together.

Q. Well, what had you been doing before you took a break?

A. Oh, I had been unloading salt from the boxcar over to the elevator and sending it upstairs.

Q. Have you seen these pictures, Ray?

A. Some of them.

Q. You have seen this one, haven't you, Ray, Exhibit 16, which shows part of the ice house and the salt dock? A. Yes.

Q. Now would you just step down here, Ray, and show the jury about where you were working prior to the time that you took this 10 minute break?

A. I was either working at one of these slots here (indicating), I can't say which one.

Q. Either the slot to the west of the elevator or the slot to the east of the elevator?

A. One of those slots, but I can't say for——

Q. You are not sure?

(Testimony of Ray Davis.)

A. I'm not sure.

Q. Then you had been unloading salt into the salt pit? A. Yes.

Q. What had you done around the elevator?

A. Oh, I had kept loading it on to the elevator, too.

Q. And they were shooting salt upstairs in the elevator? A. Yes.

Q. Then about 10 minutes before this crash occurred, you had taken a break, as you call it?

A. Yes.

Q. And during this 10 minutes, what were you doing? A. Well, I was standing——

Q. Stand around so everybody can see us, Ray, here.

A. I was standing in between one of these slots, like I said, between the track and the pit. That is when the cars came together and it scared me so bad I ran back inside.

Q. Well, in other words, you were standing in the space between the salt building itself and the cars on the track? A. Right.

Q. Right next to it. Were you smoking or——

A. No, I don't smoke.

Q. You don't smoke? [351] A. No.

Q. Just standing there taking a rest?

A. Yes.

Q. Then you can sit back there.

As you were standing there, Ray, about how far were you from those boxcars on the track there?

(Testimony of Ray Davis.)

A. Not very far, I can tell you that.

Q. Well, can you tell me about how far you were? A. About that distance (indicating).

Q. About this distance? A. Yes.

Q. From the cars themselves? A. Yes.

Q. And as you were standing there, what happened, Ray? A. Pardon?

Q. As you were standing there, what happened?

A. That is when the cars hit together. Then I heard somebody scream.

Q. Did you say you got scared?

A. Yes, I ran back inside.

Q. You ran back inside of the door by the elevator? A. Yes.

Q. And then you heard someone screaming?

A. Yes.

Q. What did you do then? [352]

A. I just stood there for a minute, about five minutes, I would say, Allan come running down the tracks yelling "Gerry got hurt."

Q. Did you go over to where Gerry was?

A. I went up on the dock.

Q. You went up to the dock? A. Yes.

Q. When you got up on the dock, Ray, do you remember the white lights running down each side of the dock? A. Yes.

Q. Were they lit?

A. Yes. the white lights.

Q. The white lights? A. Yes.

Q. And then after you got up on the dock, did you go over to where Gerry was on the ground?

(Testimony of Ray Davis.)

A. No, I could see him from the dock, but it was quite a few men standing around but you couldn't see him very good, but I saw him down there.

Q. You didn't go down yourself?

A. No.

Q. And how long did you stay around there that night after Gerry was hurt?

A. Until they carried him off.

Q. And did you work any more that night?

A. No.

Q. Did you go back any more then?

A. No.

Q. So you just worked this week or so, then?

A. Frankly, I quit that night.

Q. Quit that night. Now, Ray, as you were unloading the salt cars and as you were loading salt into the elevator and as you were standing immediately beside the salt car and between the salt car and the salt bin, before the crash occurred, did you receive any warning from anyone that cars were drifting down that track and there was going to be a crash? A. No.

Q. Did you know anything about these blue lights, Ray? A. No.

Q. Anyone ever tell you anything about blue lights? A. No.

Q. And, Ray, during the time that you worked there before Gerry was injured, had you at any time seen cars floating in on either Track 13, which is north of the ice dock, or Track 12, which is south

(Testimony of Ray Davis.)

of the icing dock, while you fellows were working on the icing dock or in the cars or on the cars or around the cars?

Mr. Cashatt: Object, your Honor, it is leading. This whole line has been. I hate to object all the time. [354]

Mr. MacGillivray: I don't think that is a leading question.

The Court: Well, I will overrule the objection.

The Witness: Would you repeat that again?

(The question was read.)

A. I didn't notice what track they was on, just heard a train. I didn't know what track it was on.

Q. You didn't know the track numbers?

A. No.

Q. What I mean, Ray, at any time while you were there, when you boys were working either icing cars or taking salt out of the cars, as you were that night, or working any place around the cars, had you ever seen other cars come in and jam into and bump those cars?

Mr. Cashatt: Object to the form of the question.

A. No.

The Court: Well, the answer may stand.

Mr. Cashatt: About three or four questions.

Mr. McKevitt: About three or four questions in one.

The Court: Yes, I know.

Mr. MacGillivray: You can break them down on cross examination.

That is all.

The Court: Court will adjourn until tomorrow [355] morning at 10 o'clock.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Wednesday, June 30, 1954.) [356]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Mr. Davis was on the stand. Will you come forward, please, Mr. Davis?

RAY DAVIS

having previously been duly sworn, resumed the stand and testified further as follows:

The Court: All right, proceed.

Mr. Cashatt: You had finished?

The Court: Have you finished direct examination?

Mr. MacGillivray: Yes.

Cross Examination

Q. (By Mr. Cashatt): Mr. Davis, you stated that you had known Gerry for a number of years, is that right? A. Yes.

Q. Before this accident happened?

A. Not too many years, I would say one year, at least.

Mr. MacGillivray: Ray, you speak up now, will you [359] please?

Mr. Cashatt: And what was your last answer, Mr. Davis, I didn't hear it?

(Testimony of Ray Davis.)

A. I say, at least one year.

Q. About one year before the accident?

A. Yes.

Q. And you both went out in July, 1952, and went to work for Addison Miller at the same time, is that right? A. Yes.

Q. And at the time of the accident, Mr. Davis, at the time you went to work and at the time of the accident, was Mr. Stintzi living at your house?

A. Yes.

Q. How long had he been living at your house?

A. I couldn't say.

Q. But at the time you went to work and the time the accident happened, he was, is that right?

A. I say at least two weeks, anyway.

Q. About two weeks. Now you have told us that you came to work on that day, Mr. Davis, on July 17, 1952, at about 3 o'clock, is that right?

A. That's right.

Q. And upon going to work on that shift at 3 o'clock, did you go directly over to the ice dock?

A. Yes. [360]

Q. And now between 3 and 4 o'clock, Mr. Davis, you and the other members of the crew brought salt up from the salt pit; you did that, didn't you?

A. We did that, but I don't know what time.

Q. But you did do that? A. Yes.

Q. After going to work that day, when you got over there you began moving ice up from the ice house up the conveyor on to the icing dock, didn't you? A. No.

(Testimony of Ray Davis.)

Q. You didn't do that? A. No.

Q. Well, were you there, Mr. Davis, on the dock at 4 o'clock that afternoon, July 17, '52?

A. I don't know. I was there, but I don't know of no definite time.

Q. Well, were you there at the time that the Northern Pacific fruit train Extra No. 51 eastbound, consisting of 55 refrigerator cars, was divided and spotted on Tracks 12 and 13?

A. I didn't see the cars come in.

Q. But did you see that train that I have referred to, the 55 cars, on Tracks 12 and 13 during that afternoon after you got to work, after 3 o'clock? A. No. [361]

Q. You didn't see that? A. No.

Q. Well, between 3 o'clock, Mr. Davis, and when you went to lunch, not putting it in time now, but between the time you came to work and the time you went to lunch, were you a member of the Addison Miller crew that iced a fruit train?

A. I was a member of the Addison Miller crew, but I don't remember icing any train.

Q. Well, when I say "train," I mean the 55 refrigerator cars, if I don't make myself clear. But you did work during that period of time icing cars, didn't you?

A. I probably—I can't say it is true, but I probably did.

Q. Yes. And isn't it true, Mr. Davis, that you finished that work about 6:10 p.m. on that day?

A. I don't know.

(Testimony of Ray Davis.)

Q. And were you there, Mr. Davis, when the fruit train was pulled off of Track 12 and Track 13, hooked together and left the yards for the East at approximately 7 p.m.? A. No.

Q. You weren't there?

A. No. If I was there, I didn't see the trains leave.

Q. Well, now, when you went to lunch, Mr. Davis, the fruit train, the refrigerator cars, was that still sitting on [362] Tracks 12 and 13?

A. I never noticed.

Q. Were there any cars on Tracks 12 and 13 when you went to lunch?

A. I never noticed it.

Q. Now during this five days before July 17, '52, had you unloaded salt at any time between that time while you were working there in 1952?

A. I can't hear you.

Q. Pardon, sir?

A. I can't hear you.

Q. All right. Mr. Davis, you have told us you worked for five days at the Addison Miller plant before this accident occurred; that is correct, isn't it? A. Yes.

Q. And during those five days, did you at any time unload salt from a boxcar to the salt pit?

A. I can't remember that. I can remember the same day Gerry got hurt I unloaded salt that day.

Q. Well, what time of the day was it when you unloaded salt on July 17, 1952?

A. I don't know.

(Testimony of Ray Davis.)

Q. What was your answer, please?

A. I don't know.

Q. Well, did you unload salt immediately after you came on [363] shift, do you remember that?

A. No.

Q. In other words, you don't know what time it was during the period after 3 p.m. when you came to work on July 17, 1952 that it was when you unloaded salt? A. No.

Q. You don't? A. I don't know.

Q. You don't know. Well, now, Mr. Davis, do you recall unloading any salt on July 16, 1952, the day before? A. No.

Q. Did you know that on July 16, 1952, that a car of salt, a Great Northern car, was unloaded on Track 13 on July 16, 1952? Did you know that?

A. No, I didn't know that.

Q. And did you know that that operation was completed in the afternoon of July 16, 1952?

A. No, I didn't know that.

Q. I see. At any time, Mr. Davis, before July 17, 1952, had you seen any salt car being unloaded at the salt house there?

A. I can't remember.

Q. Well, now, you do remember, Mr. Davis, of going to lunch on July 17, 1952; you remember that, don't you, sir? [364]

A. Yes, I remember it.

Q. And in doing that, you left the dock, went through the tunnel and went over to the ice manufacturing plant, is that right?

(Testimony of Ray Davis.)

A. You mean after I came back from lunch?

Q. No, Mr. Davis, when you went to lunch, is that what you did? A. Yes.

Q. And you don't know, then, at that time, just when you left the dock and went over to go to lunch, you don't know whether there were any cars on Tracks 12 or 13 at that time? A. No.

Q. How long did you stay over at lunch, about an hour or so?

A. I would say about an hour.

Q. And when you came back over to the ice dock after eating your lunch, the foreman, Mr. Fincher, was with you at that time, wasn't he?

A. You mean after we got back on the dock?

Q. No, as you were coming through the tunnel and going back to the dock?

A. I don't know.

Q. Well, if you can remember, Mr. Davis, where was Mr. Fincher, the Addison Miller foreman, when you first saw [365] him after having your lunch?

A. It is when he gave the instructions to some of them to work in the pit and for some of them to go carry ice.

Q. And was he up on top of the dock at that time? A. When he gave the instructions?

Q. Yes, sir? A. Yes.

Q. And was he standing right near the salt gig at that time? Do you know where the elevator that brings the salt up from the pit up to the top of the dock is? Do you know where that is?

A. Yes.

(Testimony of Ray Davis.)

Q. And that is where he was standing, was it, in that area? A. In that area, yes.

Q. Yes. Then you say he gave instructions then for some of the boys to go down and carry out slush ice, is that right? A. Yes.

Q. And what instruction did he give you at that time?

A. He didn't just give me no definite instruction, he just said, "Two or three of you guys go downstairs and work in the salt pit and two or three of you guys go the other way."

Q. He told you at that time, Mr. Davis, for two or three of you to go down and work in the salt pit, is that [366] right? A. Yes.

Q. And the work that you were going to do in the salt pit was load sacks of salt on the elevator that was going to take them up to to the top of the dock, isn't that right?

A. No. When you work in the salt pit, that includes unloading the boxcar and from the boxcar to the salt pit, from the salt pit upstairs on the dock.

Q. Well, now, who were the other two or three men that you were with?

A. Well, the only guys I can remember was—I am the only guy I remember was down there at the time.

Q. There was one other by the name of George Stahl that was down in the salt pit, wasn't there?

A. I don't remember.

(Testimony of Ray Davis.)

Q. Well, in any event, you say there was two of you were there?

A. Well, when I meant two of us, I meant just the guys I knew was there.

Q. Well, how many of you altogether were there down in the salt pit?

A. I don't know.

Q. Was there more than two?

A. Yes. [367]

Q. Was there three? A. Could have been.

Q. Well, can you give me your best recollection of how many were working down in the salt pit?

A. I couldn't give you none.

Q. You couldn't say?

A. I couldn't say.

Q. How did you get down to the salt pit?

A. I walked down some stairs.

Q. And how did you get into the salt pit?

A. From the stairs.

Q. Do the stairs go right into the salt pit itself?

A. I can't remember that, but I know you start from the stairs and you get there some way.

Q. Well, now, when you got down there, was there a salt car on the track? A. Yes.

Q. Who opened the door of the salt car?

A. I don't remember.

Q. Did you see anybody open the door?

A. No.

Q. Who put up the platform?

A. I don't know.

(Testimony of Ray Davis.)

Q. Did you see anybody put up the platform?

A. I did not. [368]

Q. When you got down there, was the platform already up? A. Yes.

Q. Was the door of the boxcar open?

A. Yes.

Q. Can you tell me anything about that boxcar, what color it was, or anything about it?

A. Just looked like an ordinary boxcar to me.

Q. Do you remember what color it was?

A. No.

Q. Now to the west of that boxcar, Mr. Davis, having in mind to the west, what kind of a car was next to it? A. I don't know.

Q. Was it a cattle car?

A. I don't know what a cattle car is from a fruit car.

Q. Well, you know the kind of cars that they ship cattle in that have siding on them, probably four to six inches, then space between so they get air; you have seen those, haven't you?

A. Yes, I have seen them around.

Q. Well, did you see one of those cars next to the cattle car? A. I didn't notice.

Q. Or to the salt car, excuse me. Well, now, what did you do as soon as you got down to the salt pit?

A. I started taking salt over to the elevator and sending [369] it up, and then later I worked in the boxcar unloading it from the boxcar, just vice versa.

(Testimony of Ray Davis.)

Q. What did you use to unload it from the boxcar?

A. One of those little deals with the two wheels under it. I don't know what you call it. And some carried it, too.

Q. Did you carry some of them? A. Yes.

Q. How big are those sacks?

A. I would say they weigh at least 80 pounds.

Q. And how long did you do that before this accident happened? A. I couldn't say.

Q. At that time, Mr. Davis, where was Foreman Fincher? A. I don't know.

Q. Wasn't he on top of the dock running the salt gig, the machine that brings the salt up to the top of the dock, right above you?

A. Well, that is where I left him, up on the dock, but what he was doing I don't know.

Q. Well, do you know who stayed up there to run the salt gig? A. No.

Q. How many trips did you make from the boxcar to the salt pit? [370]

A. I can't remember.

Q. How many sacks did you take from the boxcar, approximately, to the salt house?

A. I couldn't give you no definite number, but it was quite a few.

Q. And then you say that you quit doing that, is that right; before the accident happened, you quit unloading salt?

A. Well, we took a 10 minute break, if that is what you mean.

(Testimony of Ray Davis.)

Q. And you say you took a 10 minute break?

A. Yes.

Q. And where did you go when you did that?

A. I went out there and stood in between the boxcar and the salt pit.

Q. You mean you stood between Track 13, or the track north of the ice dock, and the ice dock itself? A. Yes.

Q. Did you stand there alone?

A. I can't remember.

Q. Was anybody with you?

A. Yes, everybody was working down there in the pit, but I am the only one that was standing out there, that I can remember, anyway.

Q. Now when you were standing there, did you see Gerald [371] Stintzi and Allan Maine?

A. No, I didn't even know where they was.

Q. You didn't see them at any time?

A. No.

Q. Did you see them come out of the doorway with a bucket of slush ice at any time?

A. No, I didn't.

Q. Never ever saw them?

A. I never saw them.

Q. And how long did you stand there?

A. About—I would say about three to five minutes.

Q. Three to five minutes? A. Yes.

Q. Or longer, possibly like 10 minutes, that you mentioned before? A. No.

Q. Well, now, when you were taking salt out of

(Testimony of Ray Davis.)

the boxcar there, putting it in the salt pit, did you see Gerald Stintzi or Allan Maine at any time?

A. No, I did not.

Q. Did you see anyone else taking slush ice out of the doorway there and carrying a bucket?

A. I did not.

Q. This platform that you mentioned here from the salt pit, the salt house, to the boxcar, how high was that from [372] the ground?

A. I don't know.

Q. Well, you were standing close to that, were you, when this accident happened?

A. I believe I was.

Q. Well, would it be approximately 45 inches from the ground? A. I don't know.

Q. Well, would it be as high as the rail in front of the jury here, Mr. Davis? Would it be that high?

A. I still couldn't say.

Q. I see. How wide was the platform?

A. I don't know.

Q. Pardon? A. I don't know.

Q. Do you know how long it was?

A. No, I don't.

Q. Well, now, were there any cars, any freight cars of any kind, east of the car you say you were unloading salt from?

A. What do you mean when you say "east?"

Q. East. Well, do you know the directions out there? A. No.

Q. Well, how many cars were on either end of the salt car that you have talked about? [373]

(Testimony of Ray Davis.)

A. I don't know, but it was quite a few cars there, but the number I don't know.

Q. In both directions?

A. Yes, I would say in both directions.

Q. In both directions?

A. In both directions.

Q. You don't know what kind of cars?

A. I don't know.

Q. And this salt car was right in the middle of this string of cars, is that right?

A. That's right.

Q. And was this salt car hooked to the car on the east and to the car on the west? Was it coupled together with those other cars?

A. I never noticed.

Q. Mr. Davis, do you remember talking with Mr. Thomsen, the Northern Pacific claim agent, on Wednesday, June 9th, at about 4 p.m. on the front porch of your home at 3511 East Garnet?

A. Yes.

Mr. MacGillivray: What year?

Mr. Cashatt: Of this year, 1954.

A. Yes.

Q. And at that time, Mr. Davis, didn't you tell Mr. Thomsen, "I was working in the salt mine?"

A. Yes.

Q. And didn't Mr. Thomsen ask you what you meant by the "salt mine?"

A. I think so.

Q. And didn't you tell Mr. Thomsen that you meant the salt house, the salt pit?

(Testimony of Ray Davis.)

A. That is what I was referring to, yes.

Q. And at that time, Mr. Davis, didn't you tell Mr. Thomsen that on that evening of July 17, 1952, that you had not unloaded any salt from a salt car?

A. No, I can't remember that.

Q. You can't remember that? A. No.

Q. Can you remember telling him that?

A. Telling him that?

Q. Yes, sir? A. No.

Q. Can you remember telling him that no salt car was being unloaded that night?

A. I can't remember that, either.

Q. Do you remember talking about salt cars, and so on, with Mr. Thomsen that evening?

A. I can remember using the word "salt" and the "pit."

Q. And you could remember using the word "mine?" A. Yes. [375]

Q. Would you say that you didn't make those statements, those last two statements, to Mr. Thomsen?

A. I did not, not remembering it, anyway.

Q. Pardon?

A. Not remembering it, anyway.

Q. What do you mean not remembering it?

A. What I mean, I mean if I said it, I don't remember it.

Q. Well, then, do you mean by that that there is a possibility that you did make those statements?

A. That's right.

Q. On Wednesday, June 9, 1954, at about 4 o'clock

(Testimony of Ray Davis.)

on the front porch of your home, is that right?

A. That is a possibility I did not say it, either. There is a possibility I did not say it, either.

Q. And there is also a possibility, isn't there, that you did make those statements?

Mr. MacGillivray: Just a minute. Mr. Cashatt, is this for the purpose of impeachment? Are you intending to call Mr. Thomsen?

Mr. Cashatt: That's right.

Mr. MacGillivray: Go ahead.

The Court: All right, go ahead.

Mr. Cashatt: That is all.

Excuse me, Mr. MacGillivray.

The Court: All right. [376]

Mr. Cashatt: I have one more question.

Q. Mr. Davis, I believe counsel asked you if the lights were on on the dock. Were the lights on on the ice dock at the time you were working where you have told us on that evening?

A. Well, I never noticed the lights until I came back up on the dock after the accident.

Q. After the accident? A. Yes.

Q. And, well, which lights were on?

A. The white ones.

Q. And which string of white lights, the string on the south side of the dock or the string on the north side of the dock? Which ones?

A. Just like I said, I don't know my directions out there.

Q. Well, take both sides of the dock, whether you know whether it was the south side or the north

(Testimony of Ray Davis.)

side, were the lights on on both sides of the dock?

A. I can't remember that. Just where I came up from the stairway, that is where the lights was on.

Q. And at that time, there was no work going on to the far east end of the dock, was there?

A. I can't remember. Everybody was so excited by the accident, they was all standing around.

Q. Well, then, it is your testimony that there were some [377] lights on, but you don't know which ones were on?

A. Yes, I know the white lights was on, yes.

Q. But were the white lights on both sides of the dock on when you came up there?

A. I can't remember. I remember seeing lights, but I don't know how many it was and I don't know where they was, except coming out of the stairway, that is where I seen them, or that is where I saw them.

Q. You saw some lights, but you don't know which ones or how many?

A. I know which ones I saw, the white ones, yes.

Q. But you don't know if they were the ones on the south side of the dock or the ones on the north side of the dock? A. That's right.

Q. And you don't know if the ones past the house in the center of the dock were on or not, the ones farther to the east? A. I do not.

Q. Did you know that the Addison Miller foreman was supposed to put up a blue light at the west end of the dock when there was any work going on on or about cars at night there? A. No.

(Testimony of Ray Davis.)

Q. You didn't know anything about that? [378]

A. No.

Q. And you didn't see any blue light on at the west end of the dock at any time that evening?

A. No. Well, I had seen blue lights just looking around, you know, just pass by and you see a light and notice it, sure. I had seen them, but what they meant I didn't know.

Q. You didn't know what they were?

A. No.

Q. But you didn't see any at the west end of the dock that evening? A. No.

Mr. Cashatt: That is all.

Redirect Examination

Q. (By Mr. MacGillivray): Ray, immediately after the accident, you said you got awful scared and ran into the salt pit? A. Yes.

Q. Did you immediately go upstairs to the top of the dock?

A. No, not until Allan Maine came down to the salt pit.

Q. How soon did you get up to the top of the dock?

A. As soon as he came down and said Gerald was injured.

Q. And when you got up to the top of the dock, was the platform on the top side well lit up? [379]

A. Yes.

Q. On the west end?

A. Like I say, I didn't know my directions.

(Testimony of Ray Davis.)

Q. Well, on the end where you came up the stairs? A. Yes.

Q. Then, Ray, have you been out there since, outo that dock since this accident happened?

A. No.

Q. Counsel asked you about the height of this platform that you rolled the little car, 2-wheel car, over from the salt car to the salt pit; do you recall that? A. Yes.

Q. He asked you how high, you don't know how high it was? A. No, I don't.

Q. You do recall, Ray, that that platform ran from the floor of the railroad car to the floor of the salt pit? A. Yes.

Q. And however high that is, that is how high the platform was? A. Yes.

Q. And about the width of the platform, the platform was wide enough so this 2-wheel cart could be wheeled back and forth on the platform?

The Court: I think you should let the witness testify, Mr. MacGillivray; you have been testifying on this [380] redirect.

Mr. MacGillivray: I'm sorry, your Honor.

Q. Was the platform wide enough to wheel this 2-wheel cart back and forth? A. Yes.

Q. Do you know how many feet it was in width?

A. I don't, no.

Q. After Fincher gave you your instructions up on top of the dock to go down and work in the salt pit, did you again see Fincher before Gerry was hurt? A. No, I didn't see him again.

(Testimony of Ray Davis.)

Q. And you told Mr. Cashatt that you didn't remember just what time it was that you unloaded salt. By that you mean you don't know what hour it was?

A. No, I don't know what time it was.

Q. Well, do you recall whether or not you unloaded salt between the time that you returned from dinner and the time that Gerry was injured?

Mr. McKevitt: This is cross-examination of his own witness, we object on that ground.

Mr. MacGillivray: Where that is cross-examination, I don't know.

The Court: Well, I think you can ask him the time as nearly as he remembers.

Q. (By Mr. MacGillivray): Well, with reference, Ray, to the [381] time that you returned from dinner and the time that Gerry was injured, had you unloaded any salt? A. Yes.

Q. Now Mr. Thomsen, the railroad claim agent, was out to see you at your house on June the 9th?

A. It was in June, yes.

Q. It was in June. What time of day was he out there, Ray?

A. Oh, I would say about 10, 12, I don't know.

Q. In the morning, you mean?

A. Yes.

Q. And how long did he stay there and talk with you? A. About 5, 10 minutes.

Q. And he asked you questions and you answered? A. Yes.

(Testimony of Ray Davis.)

Q. And did he write out what you told him on a tablet or anything?

A. I can't remember.

Q. Well, did he ask you to sign any statement?

A. No.

Q. And did you sign any statement?

A. No.

Mr. MacGillivray: That is all. [382]

Recross Examination

Q. (By Mr. Cashatt): Mr. Davis, then it is your testimony that you did unload salt on July 17, 1952, but you don't know what time you did it, is that right? A. That's right.

Mr. Cashatt: That is all.

Mr. MacGillivray: That is all.

The Court: That is all, then. Call the next witness.

(Witness excused.)

Mr. Etter: Mr. Lee.

MELVIN E. LEE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Your name is Melvin Lee?

A. Yes, sir.

Q. Where do you live, Mr. Lee?

A. 7228 East Fourth.

Q. 7228 East Fourth? A. Yes, sir.

(Testimony of Melvin E. Lee.)

Q. That is out in the Valley? [383]

A. Yes, sir.

Q. Are you married? A. No, sir.

Q. How long have you lived at that address, Mr. Lee? A. 24 years.

Q. What is your present occupation?

A. Roofer.

Q. You are a roofer? A. Yes.

Q. Who do you work for?

A. Spokane Roofing.

Q. Spokane Roofing. How old are you, Mr. Lee?

A. 23.

The Court: 23?

Mr. Etter: 23.

The Court: I thought he said he had lived at this address for 24 years.

A. Well, it is so close.

The Court: I see, all right. Well, that is all right. The family lived there before you were born?

A. Yes, quite some time.

The Court: Go ahead.

Q. (By Mr. Etter): Reverse gear, probably, Melvin. Melvin, were you employed by Addison Miller just prior to July 17th of 1952? [384]

A. Yes, sir.

Q. And when had you gone to work, if you recall, if you remember the date, for Addison Miller in 1952? A. Gosh, I don't know.

Q. Had you been working there prior to the 17th? A. Oh, yes, for some time.

(Testimony of Melvin E. Lee.)

Q. For some time. It had been a couple of weeks or three weeks, or do you have any recollection?

A. Something like that.

Q. I see. Now what were your duties during that time, what work did you perform during the time that you worked for Addison Miller prior to the 17th of July, Melvin?

A. Well, I done just a little bit of everything.

Q. Meaning what, now, briefly, to the jury?

A. Well, we iced cars, we unloaded salt, we moved ice, transported salt on top of the dock, different things, just general routine.

Q. I see. Much in the fashion that some of the witnesses have testified to here? A. Yes.

Q. Now do you recognize Gerry Stintzi here in the courtroom? A. Yes, sir, I do.

Q. And Allan Maine? [385] A. Yes, sir.

Q. And Joe Vallarano, did you recognize him?

A. Yes, sir.

Q. Now on the 17th of July, what shift were you working? A. Swing.

Q. The swing shift? A. Yes, sir.

Q. What do you mean by the swing shift?

A. Well, from 3 to 11.

Q. Had you worked the other shifts during the time that you were employed there?

A. Well, I had worked mostly days and swing.

Q. Mostly days and swing. That would be the 7 to 3 shift, the day shift; the 3 to 11, the swing?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

(Testimony of Melvin E. Lee.)

Q. All right. On the 17th, you were on the swing shift? A. Yes, sir.

Q. You went to work at what time?

A. 3 o'clock.

Q. 3 o'clock. What work did you do immediately upon reporting for work at 3 o'clock on July 17th, Melvin? A. I don't remember.

Q. You do not remember? [386]

A. No, sir.

Q. Would you say it was just the general work that you have described? A. Yes, sir.

Q. I see. All right, do you recall about what time it was that you had supper that night or lunch, whatever it might have been?

A. Not—well, to the best of my knowledge, it was about 7.

Q. It was about 7? A. Yes, sir.

Q. Do you recall whether you had your lunch with someone, some of the other fellows that were working, or did you have it alone? A. Yes.

Q. Do you recall who they were?

A. Well, there was two of them. One of them I don't know, I never did know his last name.

Q. I see, you don't recall?

A. And this one fellow I worked with him, this one guy, I worked with him all the time.

Q. You worked with him all the time?

A. Kind of a chum of mine more or less.

Q. Do you remember his name?

A. James Jerome. [387]

Q. And you had lunch with him, that you recall,

(Testimony of Melvin E. Lee.)

and one unnamed or one unknown to you at this time? A. That's right.

Q. Or un-remembered, what it might be. After you had lunch, Melvin, what work did you do, do you recall?

A. Well, I went home. I was going to put in an extra shift that night, they were short.

Q. I see.

A. So I went home after lunch.

Q. You went home after lunch?

A. Yes, sir.

Q. When did you come back?

A. Well, it was sometime after 8.

Q. I see. You say you were going to work an extra shift that night? A. Yes, sir.

Q. In other words, you were going to work your swing shift and then the shift from 11 around to 7?

A. Yes, sir.

Q. 16 hours? A. Yes, sir.

Q. What was your purpose in going home right after you had lunch?

A. Well, I went home after lunch so I could have something to eat in the morning. [388]

Q. Get another one and bring it back, was that the idea? A. Yes, sir.

Q. And you got back to your place of employment, do you recall about what time it was, that is, after you had gone home?

A. It must have been right close to 8:30, some time.

Q. Was it before the accident? A. Yes.

(Testimony of Melvin E. Lee.)

Q. I see. Now did you see the accident?

A. No, sir.

Q. You did not. When did you first hear or know anything about that?

A. Well, I met this Joe Vallarano in the tunnel, is the first I knew of it.

Q. You were proceeding in the tunnel from the outside, that is, the ice manufacturing establishment, on in under the tracks?

A. Yes, from the plant to the dock.

Q. I see. Was it on your way back from home?

A. Yes, sir.

Q. You were going north, then, were you not, in the tunnel? A. Yes, sir.

Q. You met Joe Vallarano coming the other way? A. Yes, sir. [389]

Q. That is when you first learned, I gather, about this accident? A. Uh-huh.

Q. All right, what did you do then?

A. Well, we was curious, naturally, as to just what happened, and he didn't give us any names, he just said that somebody had got hurt over there.

Q. Yes?

A. And then he didn't stop or anything, he just went on his way, and we went on ourself.

Q. I see. Where did you go?

A. We went up to the ice dock and then over the top of the car and down the other side.

Q. Down the other side? A. Yes, sir.

Q. And you saw Gerry Stintzi there?

A. Yes, sir, we did.

(Testimony of Melvin E. Lee.)

Q. You testified you didn't see the accident?

A. No, sir.

Q. All right. Do you recall what happened after you got down inside the car?

A. Well, he was laying there kicking and kind of screaming and moaning and trying—well, he was trying to get it across to us to get ahold of his mother, and we couldn't quite make out what he was saying. We was trying to [390] hold him still so he didn't do too darn much tearing around.

Q. I see. And later on he was removed?

A. Yes, sir.

Q. You were there, were you, at that time?

A. I was there from the time I got there until they took him away.

Q. All right. Will you tell me, Melvin, did you notice, before you left to go home or before you left to go to lunch at about 7 o'clock, whether there was a string of cars along Track 13 to the north of the dock?

A. I don't remember for sure.

Q. You do not remember. Do you remember when you came back, you recall that there was a string of cars there when you saw young Stintzi?

A. Yes, sir, there was then.

Q. But you don't know beforehand?

A. No.

Q. All right. Did you notice whether or not the dock, that is, the upper part of the dock running from east to west, did you notice whether or not that was lighted when you got back?

(Testimony of Melvin E. Lee.)

A. It seems to me it was.

Q. Seems to you it was. I will ask you, did you notice how many cars there were in the string when you went [391] over the cars to see what you could do for young Stintzi?

A. No, I never, I was just interested in getting over there, that was it.

Q. I see. Now did you notice, while you were working there or during the time that you had been working there, any blue lights on the dock?

A. Yes, sir.

Q. Did anybody from Addison Miller or the Northern Pacific Railroad ever tell you anything about blue lights? A. Not to my knowledge.

Q. Not to your knowledge. Foreman Fincher was the man who was running the job that night, running that shift? A. Yes, sir.

Q. Had he ever told you?

A. Never mentioned it to me.

Q. Never mentioned it to you at all. During the time that you were working there, whatever time it was, the number of weeks that you were working there, had you ever seen cars switched in on either Tracks 12 or 13, that is, the track south and the track north of the icing dock, when cars were already spotted there? A. Well, not free.

Q. Not free? A. No. [392]

Q. You never had?

A. No, sir, I had never seen that done.

Q. You had never seen that done. Mr. Lee, did

(Testimony of Melvin E. Lee.)

you know what the purpose of the blue lights was?

A. Yes, sir, I do.

Q. Beg your pardon?

A. Yes, sir, I do.

Q. What purpose——

Mr. Cashatt: Just a minute, Mr. Etter, please. I think it should be confined at this time of the accident, instead of a general question.

The Court: I think he can testify as to what the purpose was, if he knows. He is not testifying now as to whether they were on or off at any particular time; isn't that your question?

Mr. Etter: Yes, I was going to ask him what the purpose of the blue lights is, if you know, and how you got that information. That's all.

A. Well, I took switchman training for the G.N.

Q. All right.

A. And they specified strictly to us that any car, either by flag or by lamp, regardless of being daylight or night, flag by day and light by night, that those cars at any time are not to be touched until that light was removed by the man that put them there. [393]

Q. I see. And those were your instructions, is that correct? A. Yes, sir, they were.

Q. But you had never been told anything by Fincher? A. No, sir.

Q. And on this night in question, you don't know whether the lights were on or whether they were off?

(Testimony of Melvin E. Lee.)

Mr. McKevitt: Are you speaking about the blue lights?

Mr. Etter: Yes, sir, that is correct.

A. I remember the one wasn't on when we came back up.

Q. It was not. You don't know what the situation was at the time of the accident?

A. No, no, I do not.

Q. I see. Had you seen during the time you were working there, had you seen the blue lights on at various times? A. Yes, sir.

Q. You had. Had you also seen them off, of course? A. Yes, as I remember.

Q. But whether the lights were on or off, had you ever seen cars drifted in or kicked in to either 12 or 13, whether the blue lights were on or off?

A. No, sir.

Mr. Cashatt: I object to the form of the question. [394] There are two questions combined in one there.

Mr. Etter: I will reframe the question.

The Court: Do you wish to reframe it?

Mr. Etter: Surely.

Q. Did you ever see any cars drifted or kicked, cars that were already on Tracks 12 and 13, when the blue lights were on during the time you worked there? A. No, sir.

Q. Did you ever see them kicked in or drifted in when the blue lights were off during the time you were working there?

A. Not to my knowledge.

(Testimony of Melvin E. Lee.)

Mr. Etter: That is all.

Cross Examination

Q. (By Mr. Cashatt): Mr. Lee, how long did you say that you had worked for Addison Miller before this accident occurred?

A. I don't remember.

Q. Did you start in 1954—excuse me.

The Court: About two weeks, I think he said, didn't you?

A. Thereabouts.

The Court: About two weeks.

A. I don't know just how long. [395]

Q. (By Mr. Cashatt): About two weeks. Had you worked there at any time before 1952?

A. No, sir.

Q. Now during that two week period, Mr. Lee, isn't it a fact that you understood that the blue lights were to be put up by the Addison Miller foreman when any work was going on on or about cars on the track? A. No, sir.

Q. You didn't know that?

A. I did not have that understanding at all.

Q. And that night after you came back to the dock, you learned that there was no blue light on at the time this accident occurred on Track 13?

A. That was hearsay.

Mr. MacGillivray: Object to that as calling for hearsay.

The Court: You are to answer that as of your own knowledge, of course.

(Testimony of Melvin E. Lee.)

A. As far as I know, it was just hearsay, it was just the talk, just what I was told.

The Court: You shouldn't answer on hearsay.

Q. (By Mr. Cashatt): From what you learned, Mr. Lee, from working with the Great Northern, and so on, you knew that the blue lights were put up to warn switchmen so that no cars would be moved against a car protected by [396] the blue light; you learned that, didn't you?

A. Yes, sir, that's right.

Q. And you had never seen any Northern Pacific switchmen move cars in on Tracks 12 or 13 when the blue lights were on, had you?

A. Not to my knowledge.

Q. You never had seen it, had you?

A. I never seen it anywhere.

Mr. Cashatt: That is all.

Redirect Examination

Q. (By Mr. Etter): From your training for the Great Northern, Mr. Lee, did you have any other instructions with regard—or learn anything else about the moving or switching of cars into standing cars other than the protection afforded by the blue light?

Mr. Cashatt: I object to that.

Mr. Etter: He went into it.

Mr. Cashatt: These other factors would not be material in any way to the relationship of Addison Miller and Northern Pacific in this case.

Mr. Etter: Well, counsel, you inquired about his

(Testimony of Melvin E. Lee.)

training as a switchman and what the blue lights meant. I think I have a right to inquire what else he learned about [397] lights.

The Court: I think the door has been opened.

Mr. McKevitt: If your Honor please, I think Mr. Cashatt's examination was proper under the direct examination of Mr. Etter, who opened up the blue light question.

The Court: I will sustain the objection.

Q. (By Mr. Etter): Did you continue to work for Addison Miller after the 17th?

A. I just put in that late shift that night, was all.

Q. Put in the late shift? A. Yes, sir.

Q. How many were on that crew, do you recall? How many were in that crew?

A. You mean on the graveyard shift that night?

Q. Yes? A. Not very many.

Q. On the swing shift, I am talking about?

A. Oh, there must have been 25 or 30 men there, about the same complement as usual.

Q. I see. Do you know how many of those men returned to work the following day?

A. No, sir, I don't.

Mr. Etter: That is all.

The Court: Any other questions?

Mr. Cashatt: No questions. [398]

The Court: That is all, then.

(Witness excused.)

Mr. MacGillivray: Mr. Libby, please.

CHARLES LIBBY, JR.

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. MacGillivray): Your name is Charles Libby? A. Jr., that's right.

Q. And your occupation?

A. Photographer.

Q. And your place of business is where?

A. 218 South Lincoln.

Q. Mr. Libby, sometime one night last week, did you go out with Mr. Etter and myself and take some pictures at the Yardley or Parkwater yards of the Northern Pacific Railway?

A. Yes, sir, I did.

Q. What date was that?

A. The night of the 23rd, I believe.

Q. And about what time was it you started taking those pictures?

A. We started taking the pictures about 8:45.

Q. And we stayed out there until about when, do you recall?

A. Around 10:30, 11 o'clock.

Q. And do you recall how many shots you actually took?

A. I believe I made five black and white and two color shots, if I am not mistaken.

Q. Did the color shots turn out?

A. Beg your pardon?

Q. Did the color shots turn out?

A. Yes, sir.

(Testimony of Charles Libby, Jr.)

Q. I mean, did you develop the color shots?

A. Yes, sir.

The Clerk: I have marked Plaintiff's 20 and 21 for identification, your Honor.

Q. (By Mr. MacGillivray): Handing you what is marked as Plaintiff's Exhibit 20, I will ask you what that is, what it shows, and from where that picture was taken?

Mr. Cashatt: I object to any testimony off the picture, your Honor, until after it is identified and admitted.

Mr. MacGillivray: Pardon?

Mr. Cashatt: I object to any testimony off the exhibit until it is identified and admitted.

The Court: As I understand it, this is just to show what it is?

Mr. MacGillivray: To identify it. [400]

The Court: To lay the foundation for its admission as to its relevancy.

Q. (By Mr. MacGillivray): Well, first, at what time was this picture taken, do you know?

A. I would say around 9 o'clock or maybe shortly after.

Q. And the picture was taken from what position in the Yardley yards?

A. About Switch 13, I believe they call it, looking east.

Q. Looking east toward the icing dock?

A. That is correct.

Q. And at the time the picture was taken, were

(Testimony of Charles Libby, Jr.)

the white lights on the top of the icing dock illuminated? A. They were.

Q. Now is that a colored shot?

A. That is black and white.

Q. That is black and white?

A. That is correct.

Q. And does that picture, looking east, show the icing dock and white lights on the top of the icing dock? A. It does.

Q. Now handing you what is marked at Plaintiff's Exhibit 21, that is a picture taken at the Yardley yards on the 23rd of this month?

A. That is correct.

Q. At about what time was that one taken? [401]

A. I believe that one was taken about 9:30.

Q. And from what position?

A. This was taken from about Switch 13, a little bit to the side, as I recall.

Q. Which side, south or north?

A. Slightly north.

Q. And that is looking in what direction?

A. That is looking east.

Q. And does that picture show the icing dock, as you knew it, with the white lights illuminated on top of the icing dock? A. That is correct.

Mr. MacGillivray: Ask the admission.

The Court: Have you shown them to counsel?

Mr. MacGillivray: He has seen copies.

Q. This last one, is that a colored one?

A. No, that is black and white.

(Testimony of Charles Libby, Jr.)

Q. Mr. Libby, these pictures were delivered to my office? A. That is correct.

Q. Did you deliver any colored ones?

A. I did.

Q. Are you sure of that?

A. They were in the same envelope with the black and whites.

Q. Do you have copies at your place of business? [402]

A. No. On color, color shots, we process the negative to a reversal for a positive and you only have the one.

The Court: So far, there hasn't been any indication in the testimony, so far as I recall, as to where these switches are. I am not passing on the admissibility of the photographs, but I think it would make a better record if you could point that out. Of course, this witness couldn't do it, but if you can agree as to where he is talking about when he says Switch 12 and 13, was it?

The Witness: No——

Mr. MacGillivray: Your Honor, to save a little time, the next witness will point out on the exhibit just where Switch 13 is.

The Court: I see, all right.

I will excuse the jury for the morning recess here.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: All right, do you have an objection to these photographs?

(Testimony of Charles Libby, Jr.)

Mr. Cashatt: Yes, I do, your Honor, and I would like to see all of the pictures taken that evening before passing on these, if I may.

The Court: Well, they haven't got the colored ones [403] here, apparently.

Mr. Cashatt: Well, your Honor, I object to Exhibit No. 20 and Exhibit No. 21, that they were taken in 1954, that they were taken at a different time of day, after the time which has been established in the case that this accident occurred. I believe the closest we have is about 8:20 p.m., and the evidence here is these were taken about 8:45; that it would not represent a true and correct view of what any switchman or anybody else had of this location at the time these cars were switched or anything like that, and that would serve no useful purpose at all as far as——

The Court: You may be excused, if you wish, you boys, but just go quietly, we are not recessed.

Mr. Cashatt: There is no showing in the case, the evidence here, that all of the dock lights were on, and at the time these pictures were taken there is no evidence in this case that all of the dock lights were on at the time. There is some evidence that some lights were on.

Now this dock, as the evidence shows, is 300 feet long. There is no evidence as to which of those dock lights were on at the time, and here the evidence is that they are all on at the time these pictures were taken; and, further, that the pictures

(Testimony of Charles Libby, Jr.)

were taken at a different day of the year. What date was that, Mr. Libby, please?

The Witness: I believe it was the 23rd. [404]

The Court: Of June?

The Witness: Yes, sir.

Mr. Cashatt: Of June, 1954?

The Witness: 1954, yes, sir.

Mr. Cashatt: And we would have that time of the year between June 23rd and July 17th as to the length of time——

Mr. Etter: It is earlier.

The Court: It would get dark earlier the 17th of July than the 23rd of June.

Mr. Etter: It is about a minute a day.

The Court: Is that so?

Mr. MacGillivray: Yes.

Mr. Etter: Mr. Libby can qualify those.

Mr. Cashatt: Further, no showing of the time of day that these were taken on, anything like that, that would make it similar to the situation that we had on July 17, 1952.

Mr. MacGillivray: Well, as to the time, 8:45 as compared to 8:45, Mr. Cashatt. I think your Honor can take judicial notice of the fact that it becomes lighter from June 22nd on.

The Court: I think one witness testified that it was very close to 8:30; that he was in the tunnel about 8:30 and met this young man running in the opposite [405] direction.

Mr. MacGillivray: That's right.

(Testimony of Charles Libby, Jr.)

The Court: To run to call for the ambulance, and he said that was 8:30, as I recall.

Mr. MacGillivray: I think all of the evidence will show that the accident happened sometimes between 8:20 and 8:30.

The Court: What were the differences in hour of darkness between the 17th of July and the 23rd of June?

Mr. MacGillivray: Well, as I understand——

Mr. Etter: About a minute per day.

Mr. MacGillivray: ——about a minute per day.

The Witness: Well, it runs a little more than a minute per day. It won't average a minute and a half, but it will run a little over a minute.

Mr. Cashatt: One further thing, your Honor, that there is undoubtedly a train coming from the east.

The Court: May I see the picture?

Mr. Cashatt: Approaching the west, which throws light. There is no showing that that condition ever existed at the time this accident occurred.

(Exhibits handed to Court.)

The Court: Is that supposed to show the two sides of the loading dock?

Mr. MacGillivray: No, your Honor. I might point [406] out to you, here is the loading dock, this oblong (indicating).

The Court: Oh, I see. Then the train headlights are off here?

Mr. Cashatt: The ones I was referring to, your Honor, are here (indicating).

(Testimony of Charles Libby, Jr.)

The Court: Oh, that?

Mr. MacGillivray: Well, the witness can explain that, can point out to the jury, if we get it in evidence, just what these other lights were.

Mr. Cashatt: Then it might be a question, your Honor, as to what effect that would have on what anybody saw at the time this accident occurred, and so on.

Mr. MacGillivray: Unfortunately, we couldn't get Northern Pacific to turn off all their lights except the dock lights.

Mr. McKevitt: We did everything else but cease operating a railroad when you were out there on two different occasions.

Mr. MacGillivray: Mr. Cashatt was there with us, also.

The Court: I think, generally, courts allow considerable latitude in the matter of taking illustrative photographs, and, as a matter of fact, it is the usual thing, rather than the extraordinary, that pictures of a [407] scene of an accident are taken long after the accident occurred, but usually litigants are not as prompt as railway claim agents seem to be sometimes in the matter of getting the evidence. I don't say that in a derogatory way; that is their job and they do a good job.

Mr. McKevitt: No, they are supposed to.

The Court: Supposed to. Here, of course, this is a little extraordinary situation.

I think that the photographs should be admitted, with, of course, the privilege of cross examination

(Testimony of Charles Libby, Jr.)
or rebuttal testimony to show the differences and to detract from their value as much as you are able to do.

Mr. Cashatt: Excuse me, your Honor, my particular point is that the purpose is to show what any switchman or any member of the switch crew saw that night; that this isn't a true representation because there is such a difference in the time.

Now the evidence in the case is it was dusk. Here we can clearly show it is completely dark.

The Court: Well, the evidence in the case, one witness at least the jury can believe, it was very shortly before 8:30. Now if they can show the condition of darkness was comparable at the time these were taken at 8:30 on the 17th of July to the 23rd of June, I think that should be done, because you shouldn't have a different condition of [408] darkness.

Mr. MacGillivray: I think he can testify as to the darkness.

Mr. McKevitt: Another question I have in mind, your Honor, the fact that those white lights are on, I don't know how that would tend to establish any negligence on the part of the railway or prove any issue in this case.

The Court: I am not passing on that question, of course.

Mr. MacGillivray: We are going to get to that, Mr. McKevitt.

Mr. McKevitt: I understand that you are getting to everything after you get your evidence in.

(Testimony of Charles Libby, Jr.)

Mr. Etter: I wouldn't go so far as to say that.

The Court: There is evidence that there were lights on the dock. Now, of course, I think that should go to the weight of these, the number of lights on, some difference in conditions, not major ones. You are not placing any importance on the train?

Mr. MacGillivray: No, no, Leo was there.

Mr. Cashatt: None whatever.

The Court: Just happens to be out there.

I am inclined to admit them if you can show the conditions of darkness were approximately the same.

Court will recess for 10 minutes. [409]

(Whereupon, a short recess was taken, after which the following proceedings were had in the presence of the jury:)

The Court: All right, proceed.

Well, I think you should show, if you can, that the conditions of darkness were comparable to the time of the accident.

Q. (By Mr. MacGillivray): Mr. Libby, Exhibit No. 20 was taken about what time?

A. I would say somewhere between 8:45 and 9 o'clock.

Q. And No. 21?

A. And somewhere within 15 or 20 minutes afterward.

Q. After that? A. That is correct.

Q. Could you tell the jury, Mr. Libby, what the

(Testimony of Charles Libby, Jr.)

condition of darkness is as between June 23rd in any given year and July 17th in that same year?

A. Well, after the peak of the year, which is about the 21st of June, the days start getting shorter, and I only know by the duck shooting times, when it opens and closes, it varies about a little over a minute a day; in other words, your light drops off just a little over a minute a day. In the afternoon, you have to quit shooting about a little over a minute sooner one day [410] than you did the day before.

Q. Do you always do that? A. Try to.

Mr. McKevitt: That is a break for the ducks.

Q. (By Mr. MacGillivray): Mr. Libby, to get the same degree of darkness as you would have at 8:25 on July 17th of a given year, you would take a picture at approximately what time on June 23rd of that same year?

A. Well, there is approximately—did you say July 17th?

Q. July 17th and June 23rd.

A. There is approximately 24 days difference, a week left in June and 17 days in July, would be about 24 days, so I would say that there would be about somewhere in the neighborhood between 26 and 30 minutes difference in time. In other words, your pictures taken on June 23rd should be taken about somewhere between 24 and 30 minutes later at night in order to get similar conditions of darkness that you would have on a picture taken the

(Testimony of Charles Libby, Jr.)

night of July 17th, assuming that weather conditions were the same both nights.

Q. Now the night of June 23rd last week when you were out there, what was the weather?

A. The weather was good. There was a very, very slight high overcast, but not enough to bother. I mean you could see a good sunset and the visibility was very clear. [411]

Q. As a matter of fact, Mr. Cashatt was out with Mr. Etter and myself when we took or when you took the pictures? A. That is correct.

Mr. MacGillivray: Again ask the admission, your Honor, of 20 and 21.

The Court: They will be admitted. The record may show the objection.

(Whereupon, the said photographs were admitted in evidence as Plaintiff's Exhibits 20 and 21.)

Q. (By Mr. MacGillivray): Now, Mr. Libby, if you would please step down here so the jury can see the pictures. I will try to make them as close to you as possible so you can all see them.

To the left-hand side of Exhibit 20, we see what appears to be two headlights, one brighter than the other? A. That is correct.

Q. Those two are what?

A. Apparently locomotive headlights or some similar bright light in the distance. [412]

Mr. MacGillivray: (To the jury) He is referring to the two lights, headlights.

Q. Then, Mr. Libby, would you point out on

(Testimony of Charles Libby, Jr.)

Exhibit 20 the ice dock in question and the white lights on top of that ice dock?

A. That is right here (indicating).

Q. Would you just walk along so everybody can see those, the dock and the white lights on it?

A. That is it (indicating).

Q. That is the dock here, kind of an oblong shape?

A. That's right, with the lights on the top.

Q. And over to the right-hand side of the dock with the white lights on it is another light, apparently in the rear? A. That is correct.

Q. Do you know what that probably was?

A. Well, it could be either some other lights or it could be a train coming with the headlight of the locomotive.

Q. That is the light we see over here (indicating)? A. That is correct.

Q. Now, Mr. Libby, in Plaintiff's Exhibit No. 21, would you just come along and point out to the jury where the icing dock was and the white lights shown on the top of the icing dock?

A. (Witness complies). [413]

Q. That is about in the center of both exhibits?

A. That is correct.

Q. Take the stand again.

Then, Mr. Libby, you took some colored photographs? A. I did, yes, sir.

Q. I was a little mixed up on them. You delivered them to my office?

A. I did, with those——

(Testimony of Charles Libby, Jr.)

Q. I was out of town at the time?

A. That is correct.

Q. And a chap in my office, you asked him to take the pictures to Mr. Etter's office?

A. That is correct.

Q. Now the colored photographs, are they developed like this?

A. Well, they are developed, but they don't look like that in the sense that those are on paper and your color shots are on film.

Q. To someone who is not a photographer, they look like negatives? A. That's right.

Q. And those were delivered to Mr. Etter's office?

A. Well, I don't know, they were delivered to your office and the gentleman there said he would take them to Mr. [414] Etter.

Mr. MacGillivray: I might explain to counsel that Mr. Day is on his way to Mr. Etter's office to bring those back. I think Mr. Etter thought they were negatives.

Mr. Etter: So did Mr. MacGillivray.

Mr. MacGillivray: I didn't see them.

All right, you may examine.

Mr. McKevitt: I understand these photographs have been admitted, your Honor?

The Court: Yes.

Mr. Cashatt: I would like to look at those, I have never seen them.

The Court: I think they are looking at those colored films now.

(Testimony of Charles Libby, Jr.)

Mr. Cashatt: I would like permission to look at them.

The Court: Yes, you should.

Q. (By Mr. MacGillivray): Then, after taking Exhibits——

The Court: Well, will you show them to Mr. Cashatt?

Mr. MacGillivray: Yes.

Q. Mr. Libby, after taking Exhibits 20 and 21 from Switch 13, did you then move back to some other point and take another black and white picture? A. That is correct.

Q. To what point? [415]

A. The yard foreman—what do they call it, of the office?

Q. Yardmaster.

A. Yardmaster's office, that's right.

Q. Yes. A. To the west of Switch 13.

Q. And did you take a picture from that point looking in an easterly direction toward the ice dock? A. I did.

Q. You had a little difficulty getting that shot, as I recall? A. I did.

Q. Why was that?

A. Well, trains and cars and switchmen, and so on.

Q. Headlights coming toward you, and so on?

A. That's right.

The Court: Is that 22 that you are talking about?

The Clerk: 22, your Honor.

(Testimony of Charles Libby, Jr.)

Mr. MacGillivray: 22.

The Court: 22. What was the hour of taking that?

Q. (By Mr. MacGillivray): What hour was Exhibit 22 taken?

A. That was immediately after the other two shots, I would say about 15 minutes.

Q. And referring to Plaintiff's Exhibit 22, is that the black and white picture taken from the yardmaster's [416] office looking in an easterly direction toward the icing dock?

A. That is correct.

Q. And does that picture show the icing dock and the white lights on top of the icing dock?

A. That is correct.

Q. In that picture there are some other lights. Could you tell us just what they are?

A. Well, there are some lights from some of the buildings and there are some lights from a couple of locomotives that were stationed or parked off——

The Court: Don't show it to the jury yet.

A. Parked off to the side. And then these irregular lights and irregularities in there were caused by the switchmen and the trainmen walking across with their lanterns and swinging them and jumping up on the trains and back down, and so on.

Q. I see.

The Court: Were those pictures time exposures?

A. They were, yes, sir.

The Court: What was the time of exposure?

A. About two minutes on the black and white.

(Testimony of Charles Libby, Jr.)

The Court: Is that true of 20 and 21, as well as 22? A. That is correct, yes. [417]

Mr. MacGillivray: I ask the admission of 22.

The Court: Have you seen it, counsel?

Mr. Cashatt: May I ask a question or two, your Honor?

The Court: Yes.

Mr. Cashatt: Mr. Libby, this line (indicating), is that what you meant that the switchman was waving a lantern?

A. He walked across there, he walked across there with his lantern.

Mr. Cashatt: You mean sometime after you started the exposure?

A. That is correct. Any bright light, locomotive headlight, that was on full, the bright beam, I would close the exposure, but any small lantern or anything, I didn't because it doesn't hurt anything.

Mr. Cashatt: Your Honor, I make the same objection to it. As far as time or anything, I can't see how it would be material.

The Court: The record may show your objection, Mr. Cashatt, and I will admit this Plaintiff's Exhibit 22, and I will say at this time that Exhibit 20 and 21, also, are admitted only for the limited purpose of showing the lighted dock, and any other lights or objects in there other than the dock are to be absolutely disregarded by the jury. [418]

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 22.)

(Testimony of Charles Libby, Jr.)

Q. (By Mr. MacGillivray): Now, Charlie, if you would step down again here and point out to the jury as we go along. The light over here (indicating), is that a light in the——

A. Either in the window or just outside the yardmaster's string of buildings there.

Q. That is the bright lights shown on the left side of Exhibit 22? A. That is correct.

Q. Then there is another light to the right of that, but still a little to the left of Exhibit 22; what is that? A. I believe this is a locomotive.

Mr. McKevitt: That is approximately in the center of the photograph, isn't it?

A. A little to the left of center.

Mr. McKevitt: A little to the left of center?

A. That's right.

Q. (By Mr. MacGillivray): Then would you point out to the jury, and I will bring this along, folks, just where the icing dock shows up and the white lights on the icing dock in that picture?

A. Right there (indicating).

Mr. MacGillivray: Now if you have no objection, Mr. McKevitt, I can take it, Charlie.

This light over here on the left is the light from the office, the yard office (indicating). These lights are apparently lights of the switch engine. The icing dock is shown again with the lights on top of it about in the center of the exhibit here. The white lines running across here are showing up exposure of some switchman walking across with his lantern.

Q. Now these colored photographs, you have to have a box or something to show them?

(Testimony of Charles Libby, Jr.)

A. That is the better way, yes, sir.

Mr. MacGillivray: You are going to have a box here, Mr. Cashatt?

Mr. Cashatt: After you use those other pictures.

The Court: I think I will ask counsel to step up to the bench just a minute.

(Whereupon the following proceedings were had before the bench out of the hearing of the jury:)

The Court: Like most judges, I suppose, I am a little fearful of the unusual, and I have never seen this type of picture used before, except in x-rays of injuries, and I would be very much afraid to put them in this record [420] unless you can put competent evidence on here that they are a correct representation of something that a person would see and show as it would be seen.

Mr. McKevitt: That's right.

The Court: Just having these colored film photographs, I don't think I should let them in in a case of this kind. We haven't any view box here.

Mr. MacGillivray: I don't think they show much.

The Court: We haven't any view box here. Do they show practically the same thing as these other pictures?

Mr. Etter: They don't show as much.

Mr. Cashatt: I didn't see anything in them.

Mr. Etter: I can't see a thing.

The Court: If you just offer them, I will sustain an objection to them, but, of course, I won't cut you off from trying to lay a foundation.

Mr. Etter: John, I can't tell what they are about.

(Testimony of Charles Libby, Jr.)

Mr. Cashatt: Have to have a actual box, Max.

The Court: Have to have a view box and we haven't got one.

Mr. Etter: You can't see a thing in them.

Mr. MacGillivray: I will clear it up.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Q. (By Mr. MacGillivray): These colored photographs marked as Plaintiff's Exhibits 23 and 24, as you say, you need a view box to show those up?

A. To the best advantage, yes, sir.

Q. If we had a view box, would these pictures show approximately the same as is shown in Exhibits 21 and 22?

A. That is correct, only the color.

The Court: We haven't any view box here, so you may——

Mr. MacGillivray: I will withdraw them.

You may examine.

Mr. McKevitt: 23 and 24 are not offered?

Mr. MacGillivray: No.

The Court: No, they are withdrawn.

Mr. MacGillivray: You can't see them.

(Whereupon, the said colored photographs, being Plaintiff's Exhibits 23 and 24 for identification, were withdrawn.) [422]

Cross Examination

Q. (By Mr. Cashatt): One thing I would like to clear up first, Mr. Libby, would you please step over here?

(Testimony of Charles Libby, Jr.)

Exhibit 16 has been admitted and I believe you took the two pictures and pasted these together, is that correct? A. That is correct.

Q. Step around so the jury can see. Now, Mr. Libby, in looking at that, it looks like there is a corner of a building here (indicating), it looks like the railroad track goes like this and then makes a right angle? A. That is correct.

Mr. McKevitt: Hard to get a boxcar around them.

Q. (By Mr. Cashatt): Will you please kind of explain it, because I know it has been a question here?

A. Well, the space allowed——

Q. Stand so the jury can see, please.

A. ——for the taking of this picture was so close; in other words, I couldn't get back far enough to get this entire distance in in one shot. There were boxcars behind me and I had just practically as much distance as maybe from here to that map (indicating), or a little more, and I couldn't get it all in one, so I made it in two shots and joined them together and, consequently, the [423] angle of view of this shot showing the right-hand side, that way, and then turning the camera and, this being the left-hand side butted against the right-hand side of this view, tends to give that impression.

Actually, this building is one straight building, as you see it there, only straighter, no joint, and the track is straight right through there. But due to the

(Testimony of Charles Libby, Jr.)

lack of distance, there was no other way to make it.

Q. Okay, I believe that is satisfactory.

The Court: Let's see, what number is that?

Mr. Cashatt: No. 16, your Honor.

The Court: You may take the stand again, Mr. Libby.

Q. (By Mr. Cashatt): Mr. Libby, handing you Exhibits 21 and 22, sir, you say that it took about a two minute exposure, did it, to take each of those photographs? A. That is correct.

Q. And when you are taking an exposure like that, Mr. Libby, if some light passes across in front of the lens at any time during the exposure, does that register in any way on the film itself?

A. It can, yes.

Q. And in Exhibits 20 and 21, Mr. Libby, over to the left-hand side I see a very bright light in the distance. Wasn't that the Northern Pacific's main streamliner that [424] was coming through at that time?

A. It could be, yes, sir.

Q. And is that the reason that we see light at that area and the area right below, is that correct?

A. You mean on the right-hand side here?

Q. Well, it would be on the left-hand side as I am standing here. A. That is correct.

Q. Now that same situation is shown, isn't it, Mr. Libby, in Exhibit No. 21, also, the light in the background off to the right of this picture of 21?

A. That is correct.

Q. Mr. Libby, I see some light in Exhibit 21 that

(Testimony of Charles Libby, Jr.)
appears to be ahead of the ice dock. Will you please look at that and see if you can find the light I am referring to there on Exhibit 21? It looks like a light ahead to the west of the dock.

A. I wouldn't necessarily say it was to the west of the dock. It could be, or it could be right near the end of the dock.

Q. Well, Mr. Libby, if a switchman was there with a lantern or anything like that, could that cause that light shown in that location we have just talked about?

A. I don't think a lantern would give that much light, take a brighter light than that. [425]

Q. In Exhibit No. 22, Mr. Libby, I believe you stated that was the one taken up by the yard office, is that correct? A. That is correct.

Q. The light shown in a circle there, would that be a switchman swinging a lantern?

A. That is correct.

Q. And in that picture we have the same situation, don't we; we have lights to the east of the ice dock somewhere in the background, is that right?

A. That is correct.

Q. I see.

Mr. Cashatt: That is all.

Mr. MacGillivray: Just one question, Mr. Libby.

Redirect Examination

Q. (By Mr. MacGillivray): In Exhibits 21 and 22, can you see in those pictures whether or not there are any cars upon the railway tracks immedi-

(Testimony of Charles Libby, Jr.)

ately south of the icing dock, on the first track to the south of the icing dock?

A. Yes, there are.

Q. Can you say whether or not there are any cars on the track immediately north of the icing dock? A. I believe not. [426]

Q. Do you mean there are or are not cars there?

A. There are not.

Q. And you could see that from Switch 13?

A. Yes.

Mr. MacGillivray: That is all.

The Clerk: Counsel, I think that is 20 and 21, rather than 21 and 22.

The Court: Yes.

Mr. Cashatt: That is all.

(Witness excused.)

Mr. MacGillivray: Call Mr. Prophet.

LaVERNE W. PROPHET

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Mr. MacGillivray: Your Honor, Mr. Prophet is being called as an adverse witness as an employee of the Northern Pacific for the purpose of cross examination only.

Mr. Cashatt: If your Honor please, I believe under Rule 43(b), that the plaintiff is calling Mr. Prophet as their own witness, because he is not an officer, a managing agent or anything that would put him under the rule.

(Testimony of LaVerne W. Prophet.)

The Court: I think the jury may as well step out for a moment.

(Whereupon, the following proceedings were had [427] in the absence of the jury:)

The Court: The matter of calling adverse witnesses is governed by Rule 43(b) of the Rules of Civil Procedure, which provides that a party may interrogate an unwilling or hostile witness by leading questions. But, of course, you can't very well assume at the outset that a party will be hostile or unwilling. If he is an employee of the opposing party, naturally, you would perhaps expect that to occur, but if it does, then you may be permitted to use leading questions in his examination as it progresses, if that becomes necessary. But to call a party as an adverse witness, he must be either the adverse party or an officer, director, or managing agent of either the adverse party, or an officer, director or managing agent of a private corporation.

What is his capacity with the Northern Pacific?

Mr. MacGillivray: I might show it in the record, your Honor.

Mr. McKevitt: Switch foreman.

Mr. MacGillivray: In charge of the switching operation with which we are concerned here on behalf of the Northern Pacific Railway.

Mr. Cashatt: He is not the managing agent at the yard, your Honor, at the time this occurred; he was just an employee working there. [428]

Mr. MacGillivray: He was acting as the one in

(Testimony of LaVerne W. Prophet.)

charge of the very operation with which we are here concerned on behalf of the Northern Pacific Railway on the night of July 17th.

Mr. McKevitt: You mean by that that he was the man that was responsible for that switching movement being made on that track? That is not the fact.

Mr. MacGillivray: The fact is that he was in charge of that switching movement on behalf of the Northern Pacific Railway.

Mr. Cashatt: That still wouldn't make him the managing agent, your Honor.

The Court: Well, let's see, officer, director. He isn't an officer or director. He would have to be a managing agent, wouldn't he?

Mr. MacGillivray: Yes.

The Court: Just what is a managing agent, now, within the meaning of the rule?

Mr. McKevitt: A managing agent might be a division superintendent, classify him as that. This man has several men over him out there, I think the evidence will disclose that night. In that switching movement, he was acting under the orders and directions of the yardmaster; isn't that correct?

The Witness: Yes, sir. [429]

Mr. McKevitt: Sure.

Mr. MacGillivray: I think, your Honor, you could carry that argument to an absurdity and reach the point where Mr. McKevitt could argue the only one we could call as an adverse party would be Mr. McFarland or some vice-president of

(Testimony of LaVerne W. Prophet.)

the road, because the division superintendent works under Mr. McFarland's supervision; the district superintendent perhaps works under the division superintendent; the yardmaster works under the district superintendent; Mr. Prophet was in charge of this operation working under the supervision of everybody ahead of him.

Mr. McKevitt: What classification of the rule does he fall under? The rule is specific. If there is any absurdity, it is not McKevitt's absurdity, it is the rule makers' absurdity.

Mr. MacGillivray: That he was the managing agent, managing conduct of the operation conducted by the Northern Pacific on the night of July 17th with which we are here concerned. He so testified by deposition and counsel knows it.

The Court: He was in charge of switching operations, yes.

Mr. Cashatt: No, he wasn't, your Honor, he was just in charge of one switch crew and there were several switch crews that were taking orders from the yardmaster. This man [430] doesn't say what cars to move; he just follows instructions.

Mr. McKevitt: Or where to put them.

Mr. Cashatt: And I submit that certainly doesn't make him a managing agent in accordance with the rule.

Mr. MacGillivray: I submit, your Honor, on the further ground that the witness is a hostile witness; in fact, the fact*ing* being that his deposition was taken in Mr. McKevitt's office on June 18, 1954,

(Testimony of LaVerne W. Prophet.)

and that on numerous occasions during the taking of that deposition, the witness was instructed by both Mr. McKevitt and Mr. Cashatt not to answer questions put him, put to him by myself in taking that deposition. I think hostility is evidenced by the deposition.

Mr. McKevitt: That makes Cashatt and McKevitt hostile, but it doesn't make the witness hostile.

Mr. Cashatt: If it develops the witness is hostile, certainly they have a right to cross-examination. On the other hand, in accordance with the rule, we also have the right of cross-examination within the scope of the direct.

The Court: Well, I think you would have that even in the case of an adverse witness. About the only difference seems to be that in the case of an adverse witness, they have the right to impeach him and cross-examine. On a hostile witness, they merely have the right to ask leading [431] questions. I don't believe that he comes strictly within the rule of an adverse witness, but certainly one would expect him to be not too friendly, the foreman of the railroad company, in a situation of this kind, and I would suggest that you start examining him as a witness here, and if it becomes apparent that you need to lead him, I will permit you to do so. The other side may cross-examine then within the scope of the direct. They have the right of cross-examination, though, I don't think you can deprive them of that.

(Testimony of LaVerne W. Prophet.)

Mr. MacGillivray: I was going to make this suggestion, if there is any question on the point; that I will examine the witness on the subjects I have in mind; if I am at any time surprised by his answers, I will call it to your Honor's attention and then proceed to cross-examine him.

The Court: Yes, all right, that may be the proper solution.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: All right, proceed.

Direct Examination

Q. (By Mr. MacGillivray): Your full name, Mr. Prophet? [432]

A. LaVerne W. Prophet.

Q. And your occupation? A. Switchman.

Q. For who?

A. Northern Pacific Railroad.

Q. For how long have you been employed as a switchman for the Northern Pacific?

A. Over 10 years.

Q. And where is the place of your employment?

A. Yardley, Washington.

Q. And how long have you been employed as a switchman at the Yardley yards?

A. Since February the 27th, 1944.

Q. Has all of your time in the employ of the Northern Pacific been consumed at the Yardley yards? A. No, sir.

Q. The majority of it? A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. Now as a switchman, Mr. Prophet, what generally are your duties at the Yardley yards?

A. We get our instructions from the yardmaster, we proceed to take them, go out and do the work. It generally consists of a list that he will hand to us, and we will take this list, read it, go to the track that is designated at the top of the switch list, proceed to [433] get the number of cars or car or caboose, whichever the case may be, and put it on the tracks that are designated for certain cars going in specific ways.

Q. In short, as a switchman, you are engaged in the making up of trains leaving the Yardley yards and tearing down the trains terminating at the Yardley yards? A. Yes, sir.

Q. And you have been doing that for about 10 years at Yardley? A. Yes, sir.

Q. Now were you so engaged on July 17, 1952?

A. Yes, sir.

Q. What shifts do you have out there at the Yardley yards?

A. The schedule calls that an engine can be started between the hours of 6:30 in the morning and 8 in the morning; between the hours of 2:30 in the afternoon and 4 in the afternoon; and between the hours of 10:30 and 12 at night.

Q. And over this 10 year experience, have you worked all those different shifts?

A. Yes, sir.

Q. On July 17, 1952, what shift were you working?

(Testimony of LaVerne W. Prophet.)

A. I was working from 3:15 to 11:15 p.m.

Q. Did you have supper there at the yard that night? A. Pardon? [434]

Q. Did you have supper there at the yard there that night? A. No, sir.

Q. Where did you have your lunch or dinner or supper, as you might call it?

A. Went over to the Parkwater Cafe and ate.

Q. About what time?

A. I left the yard office at 8:20.

Q. And between 3:15 and, we'll say, 7:30, what had you been doing? A. Pardon?

Q. Between 3:15 in the afternoon of July 17, 1952, and, we'll say, 7:30 that evening, what had you been doing? A. Switching cars.

Q. Where in relation to the yardmaster's office? Different points?

A. Different points, yes, sir.

Q. Now, Mr. Prophet, did you discover on the evening of July 17, 1952 that there had been a serious accident at the Yardley yards in the vicinity of the Addison Miller ice dock? A. Yes, sir.

Q. About what time did you get that information?

A. I got that information about 8:40 or 45.

Q. Was that before you had gone to dinner or when you returned? [435]

A. Upon my return.

Q. And from whom did you get that information?

A. The engineer was the first one that told me.

(Testimony of LaVerne W. Prophet.)

Q. His name is Jim Pilik? A. Yes, sir.

Q. Now what time did you go to lunch that evening? A. 8:20.

Q. Immediately before 8:20 p.m., July 17, '52, had you been engaged in a switching operation?

A. Yes, sir.

Q. What was that operation?

A. We were given orders on a switch list to go to the west end of Track 43, get 14 cars, put them on Track 13.

Q. And at what time did you get those orders?

A. I couldn't say definitely, sir.

Q. Well, was it immediately before that operation started or earlier during the day?

A. It could have been and it could not have been. We might have had the orders and we could have been blocked and had to wait to fulfil the orders, or it might have been—I just don't recall exactly when we did get the orders.

Q. And about what time did you start that switching operation, taking 14 cars from Track 43 to put those 14 cars on Track 13? [436]

A. I would say approximately, I don't know definitely, but around 8.

Q. And who was in charge of that actual operation? A. The yardmaster.

Q. Was the yardmaster out personally engaged in that operation? A. No, sir.

Q. Well, who was in charge of the actual operation on the ground? A. I was, sir.

Q. Did you have a crew under you?

(Testimony of LaVerne W. Prophet.)

A. Yes, sir.

Q. Consisting of how many men?

A. Two men and myself, sir.

Q. You are referring to two switchmen?

A. Yes, sir.

Q. And was an engine used in that operation?

A. Yes, sir.

Q, How many men on the engine?

A. Engineer and fireman.

Q. Mr. Prophet, have you seen this exhibit here, the large map straight ahead of you?

A. No, sir.

The Court: Are you going to use the map?

Mr. MacGillivray: I was going to put it up, your [437] Honor, yes.

The Court: I think we may as well recess and you can put it up during the recess.

Court will recess this case until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 p.m., this date.) [438]

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to-wit.)

LaVERNE W. PROPHET

a witness called on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. MacGillivray): Do I understand, Mr. Prophet, that you haven't seen this exhibit, which is Defendant's Exhibit 1, before?

A. I have not.

Q. Would you step down and take a look at it and see if you know what it is?

A. (Standing at exhibit): General conception of the Yardley yard.

Q. Well, you recognize over on the left-hand side of the exhibit the yard office, and to the right-hand side the tunnel from the ice plant over to the salt house and icing platform?

A. Yes, sir. [439]

Q. Then the lines here are railroad tracks?

A. Yes, sir.

Q. And you run from Track 1 here, 2, 3, 4, 5, 6, 7, and the main line is Track 8?

A. Yes, sir.

Q. The Old Maine, Track 9, 10, 11 and 12, 13, to the north of the icing dock, and 14 to the north of 13? A. Yes, sir.

Q. Now you mentioned, Mr. Prophet—just stand here, I will use you on the map—that this switching operation was to take 14 cars off of Track 43 and to move them into Track 13?

A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. Now is Track 43 shown on the exhibit?

A. No, sir.

Q. Could you tell us about where it is?

A. Track 43 would come on off in this direction and slant out this way, this angle, to the yard (indicating).

Q. Would you take a pencil and draw in—you don't have to be exact, Mr. Prophet, but approximately where Track 43 comes into the other tracks?

A. We would take off from this lead here at the crossover (drawing) and go down—these are not perfect scale or anything.

Q. That's right. [440]

A. This is just a general idea of it, because I don't believe I could draw a very good picture.

Q. I understand.

A. And we go down here to what we call the "hell hole." That is a hole in the yard where cars are—it is where we have short tracks, they are not long tracks such as 1, 2, 3, 4, 5, on up to 13.

Q. Well, would the lines that you have drawn on here represent Track 43?

A. No, sir, I am coming to that, please.

Q. Fine.

A. Then we have a take-off that we call the roundhouse lead going on down toward the roundhouse. We also have a track that comes out here like this and going on down to the roundhouse that we call the outbound, that is, for engines coming out from the house on this track, hit this switch and come out to the "hell hole" lead up to the

(Testimony of LaVerne W. Prophet.)

crossover here and on through these tracks here going to the main line.

Q. Both of these tracks, then, lead to the roundhouse?

A. These both are roundhouse tracks.

Q. Would you write in there "To Roundhouse?"

A. This one is inbound.

Q. Inbound to roundhouse?

A. And this is outbound. [441]

Q. Outbound from roundhouse.

A. Now we have a track that takes off similar in this manner (drawing). That is Track No. 43.

Q. Well, would you write "Track 43" on that?

A. Track 43 (writing). And in here we have what we call an inside switch takes off to Track 42.

Q. All right, Mr. Prophet, the orders you had were to move 14 cars from Track 43 and get them down to Track 13? A. Yes, sir.

Q. What was the first thing that was done in carrying out those orders?

A. We received the orders from the general yardmaster's office, which is this building here (indicating). Now we could have these orders in this locker room or we could have received them here on what we call a lead; that is, working along here, this is known as a lead here (indicating).

Q. The lead is the track on which the switch is shown? A. Yes, sir.

Q. All right.

A. But the engine was sitting somewhere in this vicinity (indicating) when we received the orders.

(Testimony of LaVerne W. Prophet.)

Q. Well, that is approximately opposite——

A. The yard office.

Q. ——yard office? [442]

A. On the Old Main.

Q. Old Main? A. Yes, sir.

Q. All right.

A. We then take the engine, through hand signals, which is still daylight. Backup hand signal is the arm moved toward you. Now that means to come to me. Now that can be either reverse movement or a forward movement, depending upon where you are standing. You are my engineer right now, that signal would be come ahead to me, and if I wanted you to reverse, I would give you a back-away-from-me sign. That is a backup sign in daylight (indicating). A stop sign is the arm or both arms dropped from horizontal to your sides.

Q. Well, now, the engine that you were going to use, which was Jim Pilik's engine, correct?

A. Yes, sir.

Q. Was on the Old Main opposite the yard office headed in what direction?

A. The engine in switching service is always headed west with the rear of the engine in the east.

Q. So that you gave a signal to Pilik, the engineer, to reverse or go backwards and by hand signals led him up to Track 43?

A. Yes, sir. You come down through here, throw this [443] switch to get to the inbound, because you have started toward the inbound, you throw this switch here, which puts you on the outbound, and

(Testimony of LaVerne W. Prophet.)

go into 43. You have to stop here, throw this switch, because it is always lined for the inbound —or the outbound switch. You never leave a switch against an engine coming out. They are always lined to protect the engineer.

Q. Now who lined those switches from the yard office up to Track 43?

A. I don't recall definitely, but I believe I did, I wouldn't say for sure. We went in here, stopped somewhere back in here, because cars are left in the clear where a person will not be knocked off of it if he is hanging on the side, which we do quite a bit of, han*d*ing from the ladders with our foot in the stirrups, riding out or riding in, riding any place, going on top of cars. We ride on top of cars, also.

Q. How many cars were there, freight cars, on Track 43? A. That I couldn't say.

Q. Your orders were to disengage 14 of them and take them down to 13? A. Yes, sir.

Q. Now how does the engine backing up become coupled to the most easterly or westerly of those 14 cars?

A. You have what they call an automatic coupler. They are [444] open like this (indicating), and when they come together, they close in this manner. That is what they call an automatic coupler. And that joins your cars together so they can be pulled or pushed.

Q. Then who disengaged the 14 cars from the other cars to which they were attached?

(Testimony of LaVerne W. Prophet.)

A. If there were any other cars, I did.

Q. And about what time did that take place?

A. I would say somewhere in the vicinity of 8 o'clock.

Q. And so then you had the engine headed west on Track 43 and 14 freight cars attached to the engine? A. Yes, sir.

Q. What was the next procedure?

A. The next procedure was to come around, line 13 Switch.

Q. Someone walked over from Track 43. Would you write in there "13 Switch" so we will know which one it is? A. (Witness complies.)

Q. Someone walked over from Track 43 to No. 13 Switch and lined, as you call it, 13 Switch?

A. Yes, sir.

Q. That is, adjusting 13 Switch so that cars coming off of the lead would then take off on to Track 13? A. That's right.

Q. Who did that? A. I did. [445]

Q. And after that was done, Mr. Prophet, what was the next step?

A. Standing at this switch, you can see your dock here (indicating). They have blue lights at each side covering the tracks which those lights are over. Looking down, there is no blue light on either track, you can see them from here, I walked back to my engine and proceeded up.

Q. How far was it from where the engine was on Track 43 to this switch?

A. Definitely, exactly, I don't know.

(Testimony of LaVerne W. Prophet.)

Q. Approximately?

A. I would say approximately somewhere from 40 to 50 yards, maybe more, maybe less.

Q. And would you, with the red pencil, put on Track 43 an "X" as being the approximate position of the engine before you started back to Old Main?

A. I wouldn't remember where that was. I know it would be somewhere in there that the cars were in the clear. The engine is quite long, it has a coal tender behind it, and 1200 series engine and I don't know the length of those, and I don't just exactly know the length from the switch to the clearance points because I have never measured it.

Q. Well, can you put approximately where it was without [446] tying it down?

A. We were tied on somewhere in here (indicating), so the engine would be somewhere around the switch.

Q. Well, now, would you mark with an "X" where the engine was approximately?

A. The engine was sitting within this scope somewhere (indicating).

Q. Would you put an "X-1" and your initials there? A. (Witness complies).

Q. Then, Mr. Prophet, after you got back to the engine, what then transpired?

A. Then we came out the way we went back, up over the switch. This is the "Hell Hole" crossover switch (indicating).

(Testimony of LaVerne W. Prophet.)

Q. And did all cars, the 14 cars, cross over the "Hell Hole" switch and get on to Old Main?

A. Yes, sir.

Q. And was the engine then stopped?

A. Yes, sir.

Q. And where were the cars stopped at that time on Old Main with reference to the yardmaster's office?

A. The rear car was somewhere within this vicinity here (indicating).

Q. And would you put an "X-2" with your initials at that point? [447]

A. (Witness complies.)

Q. How long is the average freight car?

A. The average freight car is about 40 feet, 6 inches.

Q. So that they extended up west of the yard office for 500 to 600 feet?

A. Something like that, whatever 14 times 40 would be, approximately. There might have been some 50 foots or might have been some short cars in there, which are 36 footers.

Q. Well, it would be fair to say from 500 to 600 feet?

A. Somewhere in there, yes, sir.

Q. And when they were stopped at that point, the engine was to the west, headed west?

A. Yes, sir.

Q. Then when that was done, Mr. Prophet, did you go into the yard office?

A. I don't remember, sir.

(Testimony of LaVerne W. Prophet.)

Q. Who was the yardmaster that night?

A. Mr. Crump.

Q. Did you have some discussion with Mr. Crump, either in the yard office or immediately outside of the yard office, while those cars were standing there in front of the yard office?

A. I don't recall exactly whether we had while they were standing there or whether it was immediately after we [448] moved them.

Q. And about what time did you get those cars down there and stopped?

A. I would say somewhere a few minutes after 8.

Q. Well, how long was it after you lined up Switch 13?

A. I would say somewhere around 15 minutes.

Q. Around 15 minutes?

A. Yes, sir, that is what I had in my deposition and in my statement previously.

Q. Well, and that is correct, isn't it?

A. Yes, sir.

Q. And how long did those cars remain standing there in front of the yard office before they were again put in motion?

A. That would be hard to see again, sir.

Q. Well, approximately?

A. There wasn't any talking going on, they were evidently put right into movement, or if there was somebody else using this other lead over here, we would have waited on them, because you wouldn't let the cars go together in a side collision.

Q. Well, you recall that that night you did have

(Testimony of LaVerne W. Prophet.)

to wait for some other switching operations on the lead before you put those 14 cars in motion?

A. I don't recall whether I did or not. [449]

Q. You don't. Well, then, what was the next step before the cars were put in motion or to put them in motion?

A. There was a backup signal given to the engineer, come on back (indicating). When the engine got fairly close, I would say, oh, from here to the back wall, he was given an "easy" sign, slowing the cars down still further. But when he came alongside of the pin puller, the third man on the crew, he was given what we call a "pin sign," the pin sign was given, and the man proceeded to pull the pin on the cars and let them drift away.

Q. In other words, when that pin is pulled—that is the pin between the rear of the engine and the first freight car? A. That's right.

Q. And when that pin is pulled, the 14 cars are disengaged and started floating down Old Main?

A. That's right.

Q. And is it correct that they floated down from the position marked "X-2" or approximately that position? A. Approximately that position.

Q. Along Old Main and over the crossover switches onto the lead in the direction shown in the red pencil here (indicating); then over No. 13 Switch, they continued to drift down No. 13 Track until they reached some point [450] down here (indicating)? A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. That is the direction, of course, of those 14 cars? A. Yes, sir.

Q. Now was anyone in attendance on the top of those cars? A. No, sir.

Q. On the sides of those cars?

A. No, sir.

Q. The cars were drifting down there all by themselves? A. That is right.

Q. About what speed?

A. At about 3 to 4 miles an hour, which is switching speed.

Q. That is switching speed? A. Yes, sir.

Q. Mr. Prophet, do you know how far it is from 13 Switch to the icing dock?

A. Not exactly, no, sir.

Q. The engineer told us about 1,200 feet, is that approximately correct?

A. Could be, yes, sir.

Q. Do you know how far it is from the yard office to the icing dock?

A. Not exactly, no, sir.

Q. The engineer told us approximately 2,050 feet; would that be about correct? [451]

A. That would, sir.

Q. In other words, from the time one of your men pulled the pin up here, those cars had to drift down at least 2,000 feet at 3 to 4 miles an hour before reaching the icing dock? A. Yes, sir.

Q. You can take the stand again.

Now, Mr. Prophet, you have told me that it was approximately 15 minutes from the time that you

(Testimony of LaVerne W. Prophet.)

lined No. 13 Switch until the cars reached the front of the yard office and the engine was called to a stop there? A. Yes, sir.

Q. And about how much longer was it, or how many minutes in all was it, from the time you lined 13 Switch until your man pulled the pin and turned the 14 cars loose drifting in a westerly direction down toward Track 13?

A. I wouldn't know that, sir.

Q. Well, would you say it was at least 20 minutes? A. Could be.

Q. Could be. Could it be 25 minutes?

A. I wouldn't know, it could have been.

Q. I see. Well, could it have been more than that? A. I doubt that very much, sir.

Q. Well, would it be fair to say that it was some place between 20 and 25 minutes? Would that be correct? [452]

A. There is quite a few things to take into consideration on that one, Mr. MacGillivray.

Q. I realize that.

A. But it isn't fresh in my mind, it has been almost two years ago, and at the time that those cars were cut loose and were leaving, we had no idea whatsoever that Mr. Stintzi would have been hurt and, therefore, we weren't paying any attention to those cars particularly until afterwards.

Q. Mr. Prophet, you were there and knew all the different procedures you went through that night before those cars were turned loose. Now would it not be fair to say that it was approxi-

(Testimony of LaVerne W. Prophet.)

mately 20 to 25 minutes from the time you lined Switch 13 until those cars were turned loose in front of the yard office?

A. Mr. MacGillivray, I don't think that it would be fair for me to set any time on that.

Q. Well, Mr. Prophet, you do know it was more than 15 minutes? A. Yes, sir.

Q. Now, Mr. Prophet, you have been working there at that yard for about eight years?

A. At the time, yes, sir.

Q. Prior to the time that Gerry Stintzi was hurt? A. Yes, sir. [453]

Q. And in your work there, you became fully familiar with every operation about that Yardley or Parkwater switching yards?

A. Not every one, no, sir, because you learn something new every day.

Q. Well, you were familiar with all the switching operations?

Mr. McKevitt: If your Honor pleases, object to the form of these questions. They are all leading questions, questions in the nature of cross examination.

Q. (By Mr. MacGillivray): Insert the word "were" first, were you familiar with all switching operations? A. That I had had, yes, sir.

Q. And were you familiar, over this 8-year period, with the operations conducted at the Addison Miller icing dock?

A. How do you mean that, Mr. MacGillivray?

(Testimony of LaVerne W. Prophet.)

Q. Well, did you know what operations went on there?

A. I had never worked on the dock, no, sir.

Q. Had you ever been on the dock?

A. I might have, yes.

Q. Well, Mr. Prophet, were you familiar with what went on down there at the Addison Miller icing dock from your 8 years experience out there at the yards?

A. As far as the actual operations of Addison Miller, no, sir, I have never been present on their operations. [454]

Q. Well, did you know what they did down there at the dock?

A. I know what they do down there, yes, sir.

Q. And when is their busy season down there at the dock?

A. In the summertime when they have fruit trains.

Q. In the months of July and August?

A. Well, any time when they have fruit in season.

Q. Well, their particular busy time is in the summer months? A. Yes, sir.

Q. And did you know how many shifts they ran, say, in the months of July and August, down there at the icing dock? A. No, sir.

Q. Did you know from your 8 years experience that they were icing cars all hours of the day and night down there? A. Yes, sir.

Q. And did you have any knowledge of the type

(Testimony of LaVerne W. Prophet.)

of crew that they had down there at Addison Miller, whether it was a permanent crew or a transient crew? A. I had no idea, no, sir.

Q. Did you have any knowledge from your 8 years experience as to whether or not the Addison Miller Company employed and had working on that dock at all times young high school kids?

A. I had no knowledge of who they had working there.

Q. No knowledge. Hadn't you ever been around that dock at all, Mr. Prophet? [455]

A. How do you mean that, please, Mr. MacGillivray?

Q. Well, switching on Track 14 or switching on Track 11 or on Track 10 and walking up and down your tracks on both sides of that dock?

A. Mr. MacGillivray, we are not allowed on the dock proper.

The Court: That answer wasn't responsive. I think you may cross examine him, if you care to do so, Mr. MacGillivray.

Mr. MacGillivray: Yes.

Would you read the question back? Please answer the questions, Mr. Prophet.

(The question was read.)

Q. Hadn't you done that?

A. Noticed the employees on there?

Q. Yes?

A. I had noticed them on there, yes, sir, but what they were doing or who they were, no.

Q. And during this 8 years, Mr. Prophet, had

(Testimony of LaVerne W. Prophet.)

you ever noticed employees working on that dock after hours of darkness? A. Yes, sir.

Q. What light was provided for the employees on the Addison Miller dock while working there during hours of [456] darkness?

A. They have white and blue lights.

Q. They use the blue light to work by?

A. Not to work by, no, for their protection.

Q. The question is, Mr. Prophet, from your 8 years experience, did you know what lights were provided on the Addison Miller dock for the employees to work by at night?

A. White lights to work by.

Q. And you had known that for over this 8 year period? A. Yes, sir.

Q. And you had known from experience in seeing that dock and being by the dock at night that whenever employees were working at night, the white lights on the top of that dock were illuminated; you knew that, didn't you?

A. Yes, sir.

Q. Now, Mr. Prophet, you left Track 43 before the train with 14 cars was put in motion back toward the yard office and walked over and lined up, did you say, No. 13 Switch? A. Yes, sir.

Q. And when you lined up No. 13 Switch, did you look easterly toward the icing dock?

A. Yes, sir.

Q. What did you see? [457]

A. On Track 13, there were some cars down around the ice dock.

(Testimony of LaVerne W. Prophet.)

Q. What else did you see?

A. That is all that I recall.

Q. Were there any cars on Track 12 at that time? A. I don't remember.

Q. The only thing you recall seeing as you looked down toward that dock was some cars on Track 13? A. Yes, sir.

Q. How many cars?

A. I do not know, sir.

Q. Those cars extended from what point to what point alongside that dock?

A. I do not know, sir.

Q. What was the visibility toward the east as you lined up No. 13 Switch? A. Dusk.

Q. Mr. Prophet, when you lined up 13 Switch and looked down toward the ice dock, did you see the white lights illuminated on top of that dock?

A. I don't recall seeing them, no, sir.

Q. Have you ever seen the white lights illuminated on the top of the dock from the location of No. 13 Switch at night? A. Yes, sir. [458]

Q. Handing you, Mr. Prophet, what are marked as Plaintiff's Exhibits 20 and 21, first referring to Exhibit 20 which is a picture taken from No. 13 Switch looking toward the east and the icing dock, do you see the icing dock there? A. Yes, sir.

Q. Do you see the lights, the white lights to which we have made reference on the top of that icing dock? A. Yes, sir.

Q. And is that the view you get from No. 13

(Testimony of LaVerne W. Prophet.)

Switch at any time at night looking down toward the icing dock from that switch?

A. Again, please, sir?

Q. Well, is that the view of the icing dock and the lights on the icing dock that you get at night looking down toward the icing dock from No. 13 Switch?

A. When the lights are on, yes, sir.

Q. And does the same apply to Plaintiff's Exhibit No. 21? A. Yes, sir.

Q. Now as I understand it, Mr. Prophet, when you lined up 13 Switch and looked down toward that dock, you don't recall whether the lights were on or not? A. That's right, sir.

Q. Did you pay any attention, Mr. Prophet, as to whether or not those lights were on or off? [459]

A. White lights?

Q. Yes? A. No, sir.

Q. Well, Mr. Prophet, from your 8 years experience down there, did you know that when the white lights were on on the top of that dock and illuminated at night, that that meant in all probability there was an Addison Miller crew working on and around that icing dock?

Mr. McKevitt: Objected to as cross examination of his own witness.

The Court: Overruled, he may answer.

Mr. MacGillivray: Would you read the question?

(The question was read.)

A. In all probability, yes, but not necessarily so.

(Testimony of LaVerne W. Prophet.)

Q. The probabilities were if the white lights were on, that men were working on and around that dock? A. As a probability, yes, sir.

Q. Yes. Mr. Prophet, did you take that probability into consideration when you lined up 13 Switch and looked down toward the icing dock on the night of July 17, 1952?

A. I was looking for a blue light, Mr. MacGillivray.

Mr. McKevitt: Keep your voice up, please.

A. I was looking for a blue light.

Q. (By Mr. MacGillivray): And you were paying no attention [460] whatsoever to the white lights? A. No, sir.

Q. Do I understand from that, Mr. Prophet, that you were depending entirely on the presence or absence of a blue light at the Addison Miller dock when you lined up 13 Switch?

A. Yes, sir.

Q. Mr. Prophet, from your 8 years experience out there prior to July 17, 1952, did you know as a fact that the blue light signal at the Addison Miller dock was habitually disregarded by the foreman of Addison Miller? A. No, sir.

Mr. McKevitt: I object, if your Honor please. For the purpose not to be continually objecting, I want a general objection to this method of examining this witness on the ground he is a hostile witness and not an adverse witness.

Mr. MacGillivray: I will change the form of the question.

(Testimony of LaVerne W. Prophet.)

Q. From your 8 years experience, Mr. Prophet, out there in the yards, can you tell me whether or not the blue light signal at the Addison Miller dock was habitually disregarded by Addison Miller foremen? A. I wouldn't know.

Q. You wouldn't know? A. No, sir. [461]

Q. Well, do you know, Mr. Prophet, that during your 8 years experience, or can you tell me whether during your 8 years experience, you had on many occasions seen men working at night on and about the Addison Miller dock, icing cars on Track 12 and Track 13, with no blue light illuminated?

A. Yes, I have, with the exceptions of occasions where the fruit train pulls into the yard and fills up the complete track. Everyone knows that the train is in the yard.

Q. Just——

Mr. Cashatt: Let him answer the question.

Mr. MacGillivray: He can answer the question yes or no.

Q. The question, again, is did you know the night of July 17th and prior to that time in your experience, that you had seen men working on the Addison Miller dock, on top of cars, on Tracks 12 and 13 beside the dock, without the blue light illuminated? Now had you seen that? A. Yes.

Q. And had you seen that on many occasions?

A. Not many, no, sir.

Q. Well, how would you put it, quite a few occasions? A. Yes, sir. [462]

(Testimony of LaVerne W. Prophet.)

Q. Did that occur to you, Mr. Prophet, when you lined up 13 Switch and looked down toward the Addison Miller icing dock the night of July 17, '52?

A. No, sir.

Q. Mr. Prophet, before those 14 loose cars were turned loose at the yardmaster's office the night of July 17, 1952, did anyone on your switching crew give any warning of any nature to anyone who might have been working on and about the Addison Miller icing dock and adjacent to Track 13?

A. Not to my knowledge, no.

Q. Is there a loudspeaker system at the Yardley yards? A. Yes, sir.

Q. And how does that operate?

A. From the yardmaster's office.

Q. And do you have loudspeakers located throughout the yard? A. Yes, sir.

Q. How many of them? A. Three.

Q. And they are located where?

A. One is located south of the Havana—south of the main line, one in the middle of the yard, and one on the east end of the yard.

Q. The first one is where? [463]

A. South of Havana and south of the main track —or west of Havana and south of the main line track.

Q. That would be at the west end of the yard?

A. Yes, sir.

Q. And No. 2 is where?

A. In the middle of the yard.

Q. And No. 3 is where?

(Testimony of LaVerne W. Prophet.)

A. At the east end of the yard.

Q. Now the one in the middle of the yard is located where with reference to the Addison Miller icing dock?

A. A few car lengths this side of the building going up, or the shed going up to the ice dock.

Q. Do you know how far to the west of the ice dock? A. No, sir.

Q. Approximately 100 feet?

A. I wouldn't know, sir, somewhere in there, more or less.

Q. If you would step down here a minute, Mr. Prophet. Referring to what is marked as Plaintiff's Exhibit 15, do you see on that exhibit the west end of the Addison Miller icing dock?

A. Yes, sir.

Q. And do you see on that exhibit the loudspeaker system west of the icing dock to which you have referred? A. Yes, sir.

Q. Would you point it out to the jury? [464]

A. This pole here holds it (indicating).

Q. And on that pole——

The Court: I suggest you make some mark on the picture for the record.

Mr. MacGillivray: Yes.

The Court: Or have him make a mark.

Mr. MacGillivray: Now who has got a pencil?

Q. If you would just mark, Mr. Prophet, on there with an "X" and your initials on Plaintiff's Exhibit 15 the position of the loudspeaker system to the west of the Addison Miller icing dock.

(Testimony of LaVerne W. Prophet.)

A. (Witness complies.)

Q. Take the stand.

Mr. Prophet, what are the various purposes for which that loudspeaking system is maintained?

A. To inform switchmen of bad orders and other changes within their lists when they are down within the yard.

Q. Is that loudspeaker system maintained and used at any time to advise and warn of the movement of cars? A. Used to——?

Mr. MacGillivray: Read the question.

(The question was read.)

A. Is used to make movements of cars?

Q. Well, you can answer the question yes or no.

Mr. MacGillivray: Read the question again.

Mr. Cashatt: If your Honor please, I don't believe the question is very clear.

The Court: Well, let's have it read and see.

(The question was again read.)

A. I have never heard any warnings from it, no, sir.

Mr. MacGillivray: Cross examination, your Honor.

Q. Mr. Prophet, you remember being up in Mr. McKevitt's office on the 18th of this month?

A. Yes, sir.

Q. And I took your deposition?

A. Yes, sir.

Q. Referring to Page 35——

The Court: Pardon me, the record may show

(Testimony of LaVerne W. Prophet.)

an objection to this type of examination without your repeating it each time.

Mr. Cashatt: That is fine, your Honor.

The Court: You have a standing objection. Go ahead.

Mr. MacGillivray: To clear the record, your Honor, I am claiming surprise at the last answer of the witness.

The Court: All right.

Q. (By Mr. MacGillivray): Mr. Prophet, I will ask you if at that time this question was not asked of you by myself and if this did not take place and you did not give this answer: [466]

"Question: And I will ask again if, to your knowledge in your 8 years experience, that these two speakers connected with the loudspeaker system had ever been used to advise of the movement of cars?

"Mr. McKevitt: So far as Addison Miller employees are concerned?

"Mr. MacGillivray: So far as anyone is concerned? "Answer: Yes, sir."

Do you remember that question and that answer?

A. Yes, sir.

Q. And that was true, wasn't it?

A. There is no statement in there that says about safety, Mr. MacGillivray.

Q. Pardon?

A. That statement, I don't believe, is the same as this one.

The Court: I think what the witness has in

(Testimony of LaVerne W. Prophet.)

mind is that your question had the word "warning" in it and the question there had "advise" and not "warning."

Mr. MacGillivray: I see.

The Court: Isn't that what you had in mind?

A. Yes, sir. [467]

The Court: All right.

Q. (By Mr. MacGillivray): Is it not true, Mr. Prophet, that over this 8 years of your experience, this loudspeaker system had been used to warn various individuals of the movement of cars?

A. To advise them, yes, sir.

Q. Yes. Do some yardmasters use that loudspeaker system more than others?

A. Yes, sir.

Q. Do some yardmasters disregard and not use the loudspeaker system at all?

A. There are a few, yes, sir.

Q. Now at any time before you turned these 14 cars loose on Old Main leading down to Track 13 and until you left for lunch, did you hear anyone advise over the loudspeaker system that floating cars were coming down in the dark on Track 13 in an easterly direction?

Mr. McKevitt: One moment. Object to that as incompetent, irrelevant and immaterial, and not being within the issues of this case. There is no allegation in this complaint or the amended complaint or the statement of the issues that that loudspeaker was there for the purpose of protecting Addison Miller employees.

(Testimony of LaVerne W. Prophet.)

The Court: There is a general allegation of failure to warn. [468]

Mr. Etter: Failure to warn.

Mr. McKevitt: That is all, your Honor.

The Court: I think that is sufficient. Overrule the objection.

Mr. MacGillivray: Read the question.

(The following question was read to the witness: "Now at any time before you turned these 14 cars loose on Old Main leading down to Track 13 and until you left for lunch, did you hear anyone advise over the loudspeaker system that floating cars were coming down in the dark on Track 13 in an easterly direction?") A. No, sir.

Q. Mr. Prophet, to your knowledge, is there a telephone communicating system between the west end of the Addison Miller dock and the yardmaster's office? A. Yes, sir.

Q. And that communicating system by telephone runs both ways? A. Yes, sir.

Q. Between the dock and the office?

A. Yes, sir.

Q. Do you know of your own knowledge, Mr. Prophet, whether or not any advice was given to the Addison Miller dock by that telephone communicating system of the intended drifting of 14 cars down Track 13 in an easterly [469] direction?

Mr. McKevitt: Same objection, your Honor.

The Court: Yes, all right. Overruled.

A. No, sir, not of my own knowledge, I don't.

Q. (By Mr. MacGillivray): Pardon?

(Testimony of LaVerne W. Prophet.)

A. Not of my own knowledge, no, sir.

Q. Mr. Prophet, is this a fact, that when you lined up No. 13 Switch, you saw no blue lights at the Addison Miller dock?

A. That is right.

Q. And that at least some 15 minutes later, for that reason, that you had seen no blue lights at the Addison Miller dock when lining up Switch 13, you turned these 14 cars loose?

A. The question again, please, sir?

Mr. MacGillivray: Will you read the question?

(The question was read.)

A. Yes, sir, because I figured I had protection with my field man there.

Q. And you what?

A. I figured I had protection with the field man.

Q. And at that same time, when you turned the 14 cars loose and when you lined 13 Switch, at neither of those times did you take into consideration the white lights on the top of the Addison Miller dock or the probability [470] that if those white lights were illuminated, men would be working on and about that dock. You didn't take that into consideration, or did you?

A. I don't remember whether I took that into consideration or not.

Q. Well, you were there, Mr. Prophet, and you are the one that lined the switch and turned the cars loose. Now did you take that into consideration? A. I don't remember.

Mr. McKevitt: Cross examination, your Honor.

(Testimony of LaVerne W. Prophet.)

Mr. MacGillivray: Well, I think it is about time for it.

The Court: All right, you may continue.

Q. (By Mr. MacGillivray): Did you take that into consideration? A. I don't remember.

Q. Well, the fact is, Mr. Prophet, you didn't, isn't that true? A. Not necessarily so.

Q. Well, Mr. Prophet, did you at that time take into consideration that on quite a few times during the 8 years previous you had seen men actually working on cars at the Addison Miller dock with no blue light illuminated? A. No, sir.

Q. Mr. Prophet, you have worked out there since July 17, [471] 1952, continuously?

A. Yes, sir.

Q. I will ask you this, Mr. Prophet: Is the same system of advising Addison Miller employees, or not advising them, of the movement of cars into Tracks 12 or 13 at night when employees are working on the dock the same system as was employed prior to July 17th, or a different one?

Mr. Cashatt: Just a moment now. I object to that, your Honor. It calls for something after this accident.

The Court: I will sustain the objection. If counsel wishes to be heard, I will have the jury step out.

Mr. MacGillivray: We would, your Honor.

The Court: All right.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I tentatively ruled that I would sus-

(Testimony of LaVerne W. Prophet.)

tain the objection. It runs in my mind it is the general rule, at any rate, that changes made in methods of warning at grade crossings and such like places by railroad companies after an accident for the sake of safety are not admissible in evidence to show negligence in the former method of warning. Is that your position?

Mr. McKevitt: Absolutely. [472]

Mr. Cashatt: Further, your Honor, we have another phase in this case, that the defendant in this case is Northern Pacific and Addison Miller is in the picture.

Now whose change was it? Was it Addison Miller's change? Because if they had been negligent before, we can't help what they did afterwards, we have no control over Addison Miller. I can't see where in this case——

The Court: Well, I will hear you on this.

Mr. MacGillivray: Could you hear from my lawyer?

The Court: Yes, surely, either one.

Mr. Etter: Your Honor, the rule, of course, is as contended for on that score by counsel, but I think the rule, too, that proof of any changes or procedures after an accident, although it is not proof of negligence, may be offered, upon a proper qualification of the Court, to show that a safer method could have been used and was available.

Now in the case which your Honor heard in this Court several years ago, the same objection was made by Mr. Eckhart with regard to the erection of

(Testimony of LaVerne W. Prophet.)

a wire electric warning fence in Montana, and on the basis it could not be shown as evidence of negligence, but it could be shown there was a safer method feasible and available, the Court allowed its admission on that ground. And there are a number of cases that go to that rule that I have here, at least four of them. [473]

Mr. McKevitt: Was that an employer and employee relationship?

Mr. Etter: Yes, but that isn't the distinction. There is no distinguishing characteristic on the master and servant relationship; it is on the question of admissibility of showing a safer or more feasible way of operating and a more feasible procedure.

The question of negligence is absolutely out the window, we agree to that. It isn't proof of negligence and can't be.

Mr. McKevitt: We have no authority or power to direct Addison Miller what to do or what not to do out in those yards.

Mr. Etter: Well, then, the answer would be "no," wouldn't it?

The Court: What is it you propose to show here, Mr. MacGillivray, or Mr. Etter?

Mr. Etter: That there has been an adoption, at least, by the defendant company of new procedures as to warning about carrying things out on the track.

Now the evidence will show here, and it did from Mr. Cashatt's opening statement, that the Northern

(Testimony of LaVerne W. Prophet.)

Pacific owns all of this ice dock. As I understood his statement, they own the ice dock and they own all the appurtenances to the dock and they exercise dominion over the property except [474] to the extent of a lease arrangement with Addison Miller. We are asking them to show whether or not they haven't got new measures up there as to dumping this ice and as to going on this track since this accident.

Mr. McKevitt: What the relationship is between the Northern Pacific Railway Company and Addison Miller can best be shown by the contract between them, which they have pled in their complaint and we are willing to introduce in evidence. If you want to be sure on that score, we will give you the contract and let you prove what the relationship is.

Mr. MacGillivray: For fear of having any error in the record, and having great respect for Mr. McKevitt's legal ability, the question will be withdrawn.

The Court: All right.

Mr. McKevitt: I thought probably you would have that respect for his Honor's judicial rulings.

The Court: I don't know whether this would be within the scope of your examination here, I should think if their witnesses are on in their case, it might be a proper subject of cross-examination generally as to whether safer methods couldn't be used.

Mr. MacGillivray: That is my thought.

The Court: Without tying it to what has been done since the accident. [475]

(Testimony of LaVerne W. Prophet.)

Mr. MacGillivray: I think we will get to it before we are through.

The Court: All right, bring in the jury.

(Whereupon, the following proceedings were had in the presence of the jury.)

The Court: Proceed, then.

Mr. MacGillivray: You may examine.

Mr. Cashatt: I hate to have to bring the map out again, your Honor, but I do need it.

The Court: All right.

Cross Examination

Q. (By Mr. Cashatt): Mr. Prophet, will you please step down in front of the map, sir? We won't go back through the entire time that you picked these cars up at 43, but when you did pick the cars up, how many men were there in the entire crew?

A. The entire crew, there was the engineer, the fireman, the boiler snake or the pin puller and the field man and myself, making a total of five.

Q. And is that what you call your field men?

A. The field man is the long man or the one that generally throws the switches and keeps your cars lined for [476] tracks, any number of tracks, or any given track that you give him.

Q. Who was your field man on the night of July 17, 1952, when you made this move from Track 43 to Track 13? A. Bud Craig.

Q. Now when you lined the switch, Switch No. 13, did you look at the icing dock at that time?

A. Yes.

(Testimony of LaVerne W. Prophet.)

Q. Did you see a blue light on Track 13 at that time? A. No, sir.

Q. Did you see a blue light on Track 12 at that time? A. No, sir.

Q. Then after doing that, I believe you went on up towards the yard office, is that correct?

A. Yes, sir.

Q. Now did you leave anybody at Switch 13?

A. Not right at Switch 13, no, sir.

Q. Where did you leave anyone?

A. Mr. Craig was in the vicinity somewhere.

Q. Do you know how close he was to 13?

A. Not exactly, no, sir.

Q. And did he stay in the vicinity of Switch 13?

A. As far as I know, yes, sir.

Q. Was it his duty as a member of your crew to look for the blue light and to watch for the blue light while [477] this movement was taking place?

A. Yes, sir.

Q. Do you know if he did that?

A. Yes, sir.

Q. And how about Mr. Morton, did he stay in the location so that he could see the ice dock and see a blue light if it was on?

A. Mr. Morton was up in here, sir (indicating). It might have been he could have seen it.

Mr. McKevitt: A little louder.

A. Mr. Morton was up in this territory (indicating). He remained up there to keep lined for engine movement, and he could have seen or he could not have.

(Testimony of LaVerne W. Prophet.)

Mr. McKevitt: Just a minute. Mr. Cashatt, the location isn't identified for the record.

Q. (By Mr. Cashatt): Well, you pointed up toward a location on Defendant's Exhibit No. 1 near the yard office, is that correct? A. Yes, sir.

Q. I believe that is all I need the map for. You can be seated.

Mr. Prophet, how did you get over from Track 43 to the switch at Track 13?

A. Walked over.

Q. In walking across there, could you see or did you see [478] the ice dock at any time while you were going over there?

A. I could see it all the time.

Q. Pardon?

A. You could see it at all times.

Q. Before you got to Switch 13, did you see any blue light on the ice dock on Track 13?

A. No blue light, no, sir.

Q. And just what does the blue light mean in relation to its use out there at the Addison Miller plant?

A. A blue light means that you will not couple on to, move, that car or string of cars that is protected by a blue light; you shall not move that blue light yourself; the only person authorized to move that blue light is the person that placed it there.

Q. In other words, when the blue light is on, it says "Don't move any cars on this track;" is that right? A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. Tell us about Track 13, what kind of a track is that?

A. Track 13 is just another trainyard track.

Q. And how many tracks are there in the yards, the Northern Pacific yards, at Parkwater?

A. 55.

Q. And do you know how many cars move in and out of that yard every month, approximately, an average? [479] A. 50, 60,000.

Q. And that would be approximately 2,000, around there, a day? A. Yes, sir.

Q. Mr. Prophet, besides the cars that come in and go out of the yard, how many times on an average do you switch a car after it gets in the yard?

A. Two to three, five times.

Q. From the time it comes in until the time it leaves? A. Yes, sir.

Q. Now how many switch engines work in the yards on an average shift?

A. On an average shift at Parkwater, there are four engines.

Q. Four? A. Four, yes, sir.

Q. Switch engines? A. Yes, sir.

Q. How many shifts do they work at Parkwater, the railroad?

A. Work around the clock, three shifts around the clock.

Q. And who is the man on each shift that controls the yard, directs the movement of the cars, and so on? A. The yardmaster.

Q. And where is the yardmaster located?

(Testimony of LaVerne W. Prophet.)

A. In the yardmaster's office. [480]

Q. Now at the time you went to pick up these 14 cars on Track 43, had you received instructions from the yardmaster to do that?

A. Yes, sir.

Q. And had you received instructions from him as to where to put the cars? A. Yes, sir.

Q. Do you happen to have the instruction sheet with you that you received from him that night?

A. Yes, sir.

The Clerk: Defendant's 25 for identification.

Q. Mr. Prophet, handing you Defendant's Exhibit No. 25 for identification, is that the switch list or the instruction sheet that you received from Yardmaster Crump for the picking up of these 14 cars on Track 43 and putting them in on Track 13?

A. Yes, sir.

Mr. Cashatt: Offer Exhibit No. 25.

The Court: Show it to counsel first.

Mr. Etter: These are the cars you moved in?

A. Those are the cars that I got off of Track 43, put on Track 13.

Mr. MacGillivray: Might I ask him some questions? [481]

Voir Dire Examination

Q. (By Mr. MacGillivray): Mr. Prophet, the figures on the left-hand side of this sheet, are these the numbers of the cars that you moved in?

A. Yes, sir.

Q. Do you remember which was the most east-

(Testimony of LaVerne W. Prophet.)

erly car or the lead car as they drifted down Track 13? A. Yes, sir.

Q. Which number?

A. This one right here, sir (indicating).

Q. No. 77346? A. Yes, sir.

Q. Then in the fourth column on the card here is the numeral in red pencil "13." What does that mean?

A. That designates the track on which the cars are going.

Q. Then in the column next to that in black pencil there is the numeral "4." What does that mean?

A. That stands for the destination of the car. They use numbers for destination.

Q. Well, would you explain that a little more?

A. Well, the best way I can explain it, Mr. MacGillivray, is that an 18 spot, which I happen to know, is Pasco; a 4 spot is somewhere east, I just don't know exactly.

Q. That is the destination of the car? [482]

A. Yes, sir.

Q. Then over in the last column is written the word—— A. "Reduce."

Q. What does that mean?

A. That means that they are reducing tonnage from a train.

Mr. MacGillivray: No objection to 25.

The Court: It will be admitted.

(Testimony of LaVerne W. Prophet.)

(Whereupon, the said switch list was admitted in evidence as Defendant's Exhibit No. 25.)

Q. (By Mr. Cashatt): In the operation of the yard, Mr. Prophet, does the yardmaster have at his finger tips or on his desk knowledge of where the various cars are located throughout the yard?

A. Yes, sir.

Mr. MacGillivray: Objected to as improper cross-examination. This would be a part of their case in chief.

The Court: What was that last question?

(The question was read.)

The Court: The question is whether it is within the scope of the direct examination?

Mr. MacGillivray: Yes, your Honor. [483]

The Court: I rather doubt that it is.

Mr. Cashatt: It may not be within the scope of the direct. I will withdraw it. Possibly it is more in our case.

The Court: If you wanted to exhaust this witness and make him your witness, I don't think there would be much objection to that.

Mr. Cashatt: Well, I would rather, your Honor, have him return in our case.

The Court: I see, all right.

Mr. Cashatt: Just two or three further questions.

Q. Mr. Prophet, counsel asked you several questions in regard to the lights at the ice dock when you were at Switch 13. When you were standing

(Testimony of LaVerne W. Prophet.)

at Switch 13, the fact that the lights may have been on at the ice dock at the Addison Miller ice dock, did that in any way indicate to you that anyone would be on the ground and crawling under the couplers of two cattle cars on Track 13?

A. No, sir.

Q. Have you seen times, Mr. Prophet, when you are working in the yard there when all of the lights were on on the Addison Miller dock and no one was working on the dock? A. Yes, sir.

Q. Seen that on many occasions? [484]

A. Not too many, but some, yes, sir.

Q. In other words, if the lights were on the dock on the night of July 17, '52, at the time you were at Switch 13, did that have any significance to you at all? A. No, sir.

Q. Now this loudspeaker system, Mr. Prophet, there is no connection between that loudspeaker system in the N. P. yard office and the Addison Miller dock, is there? A. Not that I know of.

Q. And that loudspeaker system is used by the yardmaster to instruct the switchmen, is that right?

A. To the best of my knowledge, yes, sir.

Q. Now counsel asked you if you knew if there was a phone between the N. P. yard office and the Addison Miller dock, and I believe you stated yes, did you? A. Yes, sir.

Q. Did you know at that time, Mr. Prophet, if it was the custom of Addison Miller to call the Northern Pacific yard office and tell them if they had anyone working on or about cars?

(Testimony of LaVerne W. Prophet.)

A. Yes, sir.

Q. It was their custom, was it?

A. Yes, sir.

Q. And on July 17, 1952, did you receive any information through the yardmaster that Addison Miller, through the [485] foreman, had called and advised that any of their employees were on the ground under couplings or about cars?

A. No, sir.

Mr. Cashatt: That is all.

Redirect Examination

Q. (By Mr. MacGillivray): Mr. Prophet, you say it was the custom for Addison Miller at all times to call on the telephone system to the yard office and tell them when anyone was working on the dock or on any icing operations?

A. That is the understanding we have, yes, sir.

Q. Did you have that understanding on July 17, 1952?

A. I don't remember just when it was when that came to light.

Q. Well, that understanding has arisen since the accident to Gerry Stintzi on July 17, '52, hasn't it?

A. I couldn't say.

Q. As a matter of fact, the system has arisen since July 17, 1952, that either by call on the telephone or by use of the loudspeaker system, Addison Miller is advised by the yardmaster of the movement of cars on either Tracks 12 or 13, isn't that correct? A. Not to my knowledge. [486]

(Testimony of LaVerne W. Prophet.)

Mr. Cashatt: Just a minute. Same objection as to being after the time, your Honor. I confined my questions to July 17, 1952.

The Court: I think that is proper redirect. Overruled.

Mr. McKevitt: Of course, I have in mind, your Honor, that Mr. MacGillivray, on his examination of this witness, asked if a telephone was there and whether it had been used on that particular evening.

The Court: Now the question is whether it was used in this particular way only after the accident. He seems to indicate—I don't know whether he said or not. Has he said whether it was after?

Mr. Etter: He said he didn't know.

Mr. MacGillivray: He said he didn't know. I am trying to find out.

The Court: All right, go ahead.

Mr. MacGillivray: Read the question back.

(The question and answer were read.)

Q. (By Mr. MacGillivray): Would you say that that is not the fact, or is it that you don't know?

A. I don't know that they call Addison Miller.

Q. Now you say, Mr. Prophet, that you have seen lights on the top of the Addison Miller dock at night and no one was working? [487]

A. Yes, sir.

Q. And you said that you had seen that but not on very many occasions? A. Yes, sir.

Q. And you are speaking of your eight years experience prior to July 17, '52?

(Testimony of LaVerne W. Prophet.)

A. Yes, sir.

Q. With the exception of this not many occasions, on all other occasions at night when the lights were illuminated, employees were working on and about that dock; is that not correct?

A. No, sir.

Q. Pardon? A. No, sir.

Q. What is the fact?

A. I have seen them standing around just talking, sir, where there was no one working. They would be standing in a group, just standing there talking.

Q. Well, they would be present on and about the dock, whether actually engaged in manual labor or taking a rest? A. Yes, sir.

Q. Yes. So that when white lights are lit on the top of that dock at night, it is not only a probability, from your experience, it is almost a certainty that men are [488] on or about that dock; isn't that correct?

Mr. McKevitt: Objected to, if your Honor please, as being repetition, cross-examination.

Mr. MacGillivray: He is going a little further.

The Court: Well, I think it is going into repetion, but I will let him answer this question.

A. Question, please, sir?

Mr. MacGillivray: Would you read it back, please?

(The question was read.)

A. Almost.

(Testimony of LaVerne W. Prophet.)

Mr. McKevitt: Objected to on the further ground it is calling for the conclusion of the witness.

The Court: Overruled.

A. Almost.

Q. (By Mr. MacGillivray): Pardon?

A. Almost.

Q. Almost? You mean almost a certainty?

A. Almost a certainty.

Q. Yes. Then you talk about the blue light, Mr. Prophet. Is that some rule adopted by the railroad?

A. That was in the book of rules when I hired out.

Q. And that is the one rule you had in mind when you turned these 14 cars loose the night of July 17th, the blue light rule?

A. I don't quite understand you, sir. [489]

Q. Did you have in mind any other railroad rule when you turned those cars loose that night?

Mr. McKevitt: Objected to as incompetent, irrelevant and immaterial. There is no allegation of a rule violation in the pleadings or statement of issues.

Mr. Etter: There doesn't have to be an evidentiary allegation of a rule violation.

The Court: I will overrule the objection.

Mr. MacGillivray: Read the question back.

(The question was read.)

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Did you have in mind at that time Rule 805 of the Consolidated Code, reading as follows——

(Testimony of LaVerne W. Prophet.)

Mr. McKevitt: Your Honor, I am going to object to this, of going into this Consolidated Code of Operating Rules. There is nothing in the pleadings here to indicate in any manner that this man was injured by virtue of the violation of a rule enacted for his protection.

Mr. Etter: Failure to warn is alleged in three separate allegations in different fashion.

The Court: Well, does this rule have to do with warning?

Mr. Etter: Certainly it has to do with warning. [490]

Mr. Cashatt: Your Honor, but the employee here was an Addison Miller employee.

Mr. Etter: Yes, but this rule has to do with warning anyone. Anyone.

Mr. MacGillivray: Let's read the rule and then make the objection.

Mr. McKevitt: Well, if you read the rule, why then——

Mr. MacGillivray: May I hand the rule to your Honor?

The Court: Yes.

Mr. McKevitt: Let the Court read the rule.

Mr. MacGillivray: 805, marked there in pencil, your Honor.

(Document handed to Court.)

The Court: I will overrule the objection. The record may show the objection.

Q. (By Mr. MacGillivray): Mr. Prophet, at that time when you turned those cars loose drifting

(Testimony of LaVerne W. Prophet.)

down Track 13, did you have in mind this rule, being Rule 805 of the Consolidated Code, 1045 Edition, reading as follows:

"Before moving cars on engines in a street or on station or yard tracks, it must be known that they can be moved with safety."

Did you have that in mind? [491]

A. In the back of my mind, yes, sir.

Q. Pardon?

A. Probably in the back of my mind, yes, sir. You can't hold 900 some in the front of your mind.

Q. Well, did you consciously have in mind that rule that night?

A. I don't know whether I had it consciously or not.

Mr. McKevitt: May it be understood I have a general objection?

The Court: Yes, the record may show a continuing objection.

Q. (By Mr. MacGillivray): Mr. Prophet, did you have in mind that night this section of Rule 805:

"Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone."

Mr. McKevitt: Same objection.

Q. (By Mr. MacGillivray): Did you have that rule in mind?

Mr. McKevitt: Same objection.

(Testimony of LaVerne W. Prophet.)

The Court: All right, overruled.

Q. (By Mr. MacGillivray): Did you have that rule in mind consciously that night?

A. I didn't know that those cars were being loaded or we [492] would——

Q. You didn't know they weren't?

A. That they were being loaded or unloaded.

Q. And you didn't know that they were not being loaded or unloaded, did you?

A. No, sir.

Q. Then, Mr. Prophet, in referring to the sketch here, Mr. Cashatt asked you a question about whether your man Craig was left at Switch 13, and I believe your answer was no and you said he was left over in this vicinity (indicating). Were you pointing to the vicinity of Track 43?

A. No, sir.

Q. Where was Craig?

A. To the best of my knowledge, sir, he was up around another switch that isn't even shown on that chart at all.

Q. And how many yards from Switch 13?

A. I wouldn't know, sir.

Q. Well, approximately?

A. I don't know, sir, I never measured them.

Q. And that is one of the switches leading from Track 43 into the outbound? A. No, sir.

Q. Well, what switch, then? [493]

A. It is in the "hell hole," sir.

Q. One of the "hell hole" switches?

A. Yes, sir.

(Testimony of LaVerne W. Prophet.)

Q. That is quite some distance from Switch 13, is it not? A. Some distance.

Q. Yes. Then one more thing, Mr. Prophet: Did you make the statement, did I hear you correctly, that at the Yardley yards Track 13 is just another trainyard track? A. Yes, sir.

Q. Does that apply also to Track 12?

A. Yes, sir.

Q. In other words, Track 13 and Track 12 to you switchmen at the yard are no different than Track 1 or Track 2?

A. That is right, trains are made up on all tracks.

Q. Pardon.

A. Trains are made up or broke up on all 13 of those first tracks.

Q. Well, with reference to how you operate that yard, the operation is no different on Track 12 or 13 than it is on 1 or 2? A. No, sir.

Q. You take no more precautions on 13 or 12 than you do on 1 or two?

A. Only when there is a blue light.

Q. Well, you take the same precautions when there is a [494] blue light on 1 and 2, don't you?

A. Yes, sir.

Q. So that is the same on both tracks, isn't it?

A. Yes, sir.

Q. And you take no further precautions on 12 or 13 than you do on 1 or 2? A. No, sir.

Q. In other words, it doesn't enter and never

(Testimony of LaVerne W. Prophet.)

has entered into your considerations out there prior to July 17, 1952, did it?

A. Mr. MacGillivray, I still didn't——

Q. Now yes or no, Mr. Prophet?

A. Question, please.

Q. And then explain.

A. Question, please.

The Court: Read the question.

(The question was read.)

A. No, not prior to.

Mr. MacGillivray: That is all.

Recross Examination

Q. (By Mr. Cashatt): Mr. Prophet, who out there at that yard on July 17, 1952, what employee of the Northern Pacific had the duty of knowing what cars were on Track 13 when you were [495] instructed to put these others in?

A. The yardmaster.

Q. And from your work around there and your knowledge of the operation in that yard, does the yardmaster know before he gives you instructions as to what cars are on that track? A. Yes, sir.

Q. And were you relying on the instruction given you by the yardmaster when you put the 14 cars in on Track 13? A. Yes, sir.

Q. And, Mr. Prophet, under what circumstances have you seen a car or cars being iced by Addison Miller employees when the blue light was not on?

A. When a full train would come into the yard, would pull in on Track 12 or Track 13 there from

(Testimony of LaVerne W. Prophet.)

one end of the ice dock to the other; there will be sometimes too many cars for the track, other times there aren't. A fruit train will consist of anywheres from 55 to 100 cars. 100 cars, those rails will not hold, so you cut them and push them in on the other track. I have seen that where they didn't use a blue flag on that occasion because you knew they were there. You heard them come into the yard, you seen them come into the yard, and everyone knows that they are there, something that you just know, and you take your work, you never see where [496] you will get a list to kick cars in on those tracks when there is a fruit train being iced there. The yardmaster gives you your dope and he generally keeps you away from those tracks.

Q. And have you ever seen any Addison Miller men, during the time you have been out there, icing cars when the blue light wasn't on under any other circumstances than what you have just told us?

A. Not to my knowledge.

Q. In all your experience out there, Mr. Prophet, did you ever see any Addison Miller men carrying slush ice out under the couplings of cars standing on Track 13? A. No, sir.

Mr. Cashatt: That is all.

The Court: Any further questions?

Mr. MacGillivray: One question.

Redirect Examination

Q. (By Mr. MacGillivray): Mr. Prophet, when I took your deposition on June 18th and asked you

(Testimony of LaVerne W. Prophet.)

about seeing men icing cars without the blue lights illuminated, you didn't give me this long explanation, did you? A. No, sir.

Q. Do you recall the question I asked you and the answer [497] you gave at that time?

A. Yes, sir.

Mr. McKevitt: What page is that, Mr. MacGillivray?

Mr. MacGillivray: Page 32.

Mr. Cashatt: Your Honor, I object to this as not proper redirect here. The witness was questioned in the same fashion as he was there. He wasn't asked to explain it, and all I did was go back and ask him to explain it.

The Court: All right, overruled.

Q. (By Mr. MacGillivray): Mr. Prophet, you remember my asking this question, this going on, and your giving these answers:

"Question: All right, during your eight years experience, had you ever seen men icing cars of the Addison Miller dock at night without the blue light illuminated?

"Mr. Kevitt: Do you understand that question? Have you ever seen men icing refrigerator cars when there wasn't a blue light to warn the switching crew?"

"Answer: Yes, sir, I have."

You remember that?

A. Yes, sir. [498]

Q. (Continuing):

"Question: On how many occasions?

(Testimony of LaVerne W. Prophet.)

"Answer: I don't know the exact figure but quite a few times."

Do you remember that?

A. Yes, sir.

Q. (Continuing):

"Question: And that also is over this period of eight years?

"Answer: Yes, sir."

You recall that?

A. Yes, sir.

Mr. MacGillivray: That is all.

Recross Examination

Q. (By Mr. Cashatt): Mr. Prophet, if Mr. MacGillivray had asked you at that time under what circumstances you had seen this occur, would your answer have been just the same as you gave here in court today?

A. I believe it would have, sir.

The Court: Any other questions of this witness?

Mr. MacGillivray: That is all.

(Witness excused.)

The Court: Court will recess, then for 10 minutes. [499]

(Whereupon, a recess was taken, during which the following proceedings were had in chambers, all counsel being present:)

Mr. McKevitt: I wanted to discuss briefly with your Honor and counsel this reference to Rule 805 that Mr. MacGillivray read. He only read a portion of that rule and we desire to know at this time if

he is offering that rule in evidence. If he is, he should offer the entire rule, because it is our position, if your Honor pleases, that an analysis of that rule would show that it has no application to Addison Miller employees, and particularly one who was engaged in the activity of Stintzi, because if we were bound to comply with the rule or that portion of the rule that Mr. MacGillivray called attention to, it would require a switchman to go down there, irrespective of whether there were 10 cars on that track or 50 or 60, to examine that whole train from one end to the other to see whether or not fellows are crawling underneath couplers and emptying ice.

There is no contention made in the pleadings at all that we have violated any rule and this comes as a complete surprise to us.

I don't think it is fair to the defendant to have counsel just refer to one or two sentences of one paragraph of a rule that contains any number of provisions, and the [500] portion of the rule that he refers to could only have been called to the witness' attention for the purpose of showing that that rule was for the benefit of this young man at that time, and, in order to establish that fact, the rule in its entirety should go into the record.

Mr. MacGillivray: The examination was this: The witness testified that he had in mind at the time he turned these cars loose the blue light rule, of course, upon which the defendant relies in this case. The examination, which I think was proper of the witness, was as to whether or not he had two sec-

tions of Rule 805 in mind at that same time, and that is as far as the examination went.

Mr. McKevitt: Wasn't it your intention to convince the Court and jury that this rule was enacted for the benefit and for the protection of Addison Miller employees generally, and this boy in particular, at the time he was doing what he did do?

Mr. Etter: I will say yes, that is the intention, and I am certain it is embodied in the rule itself, because the rule provides that before moving cars or engines in a street or on a station or yard track. Now when it refers to "anyone," it refers to anyone under any circumstances, during any switching movement, whether it is in your yard, your station or a street. I think it is clear.

Mr. McKevitt: Of course, that makes us an insurer [501] of everybody in that yard.

Mr. Etter: It doesn't make you an insurer at all. As a matter of fact, I think that the blue light rule is no positive rule of protection; that they are still required by the railroad to exercise due and reasonable care; and the jury has a right to determine what is due and reasonable care under all rules that may be applicable to that particular switching movement. That is a question of fact for them.

Mr. McKevitt: Well, our position is, your Honor, that if they are relying on any provision of that rule, that the rule in its entirety should go in.

I don't want to be put in the position of offering the rule and then have them say we waived our objection to it. In fairness, they ought to do it.

Mr. Etter: You can put in any other section of

the rule you desire, but I don't think there is any proscription to our taking any particular section that may have application to this situation and asking the man if he knows anything about that. If there are other sections that are applicable, I think you have a right to introduce them.

Mr. McKevitt: I don't think any section is applicable.

Mr. Etter: There is no railroad court here that says they aren't. That is your position; we can take the opposite. [502] Where have you got any interpretation that says your interpretation applies?

Mr. McKevitt: I have had plenty. I had this same question come up down before Judge Clark in Moscow in October.

Mr. Etter: You had one on a rule that was nonexistent.

Mr. McKevitt: Mr. Etter, you weren't there, you don't know what I am talking about.

Mr. Cashatt: As I see it, your Honor, the way it is in the case now, no matter what a man is doing, if he is crawling between cars, and so on, the rule is not applicable to the situation here. There is no evidence he was unloading or doing anything of that type; the only undisputed evidence is that he was crawling under the couplers.

The Court: Well, here is the position it puts the Court in: This witness says that he is relying on the blue light rule, and it seemed to me proper cross-examination to call to his attention other rules that appeared on their face to be applicable, general language in there as to moving cars and when

it doesn't appear that it is safe to do so. Of course, if there are other parts of the rule or other rules that are applicable, I should think that it would be the duty of the defendant to put them in. If they refer to a part of a rule, then, of course, that opens the door, you [503] can put the whole rule in if you wish to offer it.

Mr. McKevitt: Well, we would be offering the entire rule for the purpose of showing that the rule and the portion they refer to has no application to the situation at hand.

Mr. MacGillivray: I believe the rule must be given a common sense application. I don't follow Mr. McKevitt's argument. I think it would be applied this way: That if a switchman engaged in the movement of cars has reason to believe that someone might be endangered by the movement of the cars, then a duty arises upon him. However, if under the circumstances it appears that he did not, as a reasonable man, have any reason to believe that anyone would be endangered, then the rule wouldn't be applicable.

Mr. Etter: That is a matter of argument, isn't it?

The Court: I think it is a matter for instruction and argument. I don't propose to instruct any jury that the railroad company is an insurer of Addison Miller employees or that they were bound to know that somebody was going under the cars, but that is a matter for instruction when the proper time comes, I should think, to limit the application of the rule, if it is to be submitted to the jury at all. Of course,

so far you haven't got anything in the record. It seems to me that the witness indicated he wasn't familiar with the rule, didn't he?

Mr. McKevitt: No, he was just asked if he had that [504] rule in mind; he wasn't asked if he was familiar with it. He said "Did you have this rule in mind."

The Court: Yes.

Mr. McKevitt: That is what he asked him.

Mr. Etter: Well, he didn't answer that he didn't know the rule at all, never heard of it.

The Court: No, I assumed that there was no question about its being in the rule book and part of the rules.

Mr. McKevitt: Well, I can't think of any reason for the question being put, despite the clever way in which it was put, except to convey to the jury the impression that we had violated some rule that was enacted for the benefit of Stintzi. Now they can't say that wasn't their purpose.

Mr. MacGillivray: Well, and maybe you did.

Mr. Etter: That's right.

Mr. McKevitt: Maybe we did what?

Mr. MacGillivray: Violate a rule.

Mr. McKevitt: Well, then, put the whole rule in.

Mr. MacGillivray: We will get around to that.

Mr. Etter: You can put it in.

Mr. McKevitt: I will leave that up to the chief counsel here, my colleague, as to what he wants to do. I know what I would do with it under certain circumstances.

The Court: Well, I think so far there has only

been cross-examination on the part of the rule. The rule isn't [505] in evidence.

Mr. MacGillivray: No, that's right.

The Court: Just simply a mention of it by way of cross-examination, so at this stage I don't think there is anything that is before the Court to instruct on any basis of liability or negligence.

Mr. Etter: The blue light rule isn't even in.

The Court: No, I don't think it is. There has been a lot of testimony about it.

Well, I think we will just have to go ahead and then make the decisions as the questions arise.

Mr. MacGillivray: We have got another problem I know your Honor has thought of, and that is getting through with this lawsuit.

The Court: In what?

Mr. MacGillivray: Getting through with this lawsuit.

The Court: Well, I have thought about that. I don't think we want to work the jury on the 4th of July if we can avoid it.

Mr. MacGillivray: No. Well, I had in mind that you had to go to San Francisco.

The Court: Well, I am supposed to go Saturday morning, but, of course, I could get there by leaving later, but I am afraid we wouldn't have a jury in a very good frame [506] of mind if we kept them here Saturday and perhaps into Sunday getting their verdict returned. And if we don't get through, of course, we would have to recess this over until about the middle of August before I can

take it up again, because I will be in San Francisco all during the month of July.

Mr. Etter: Could we work tonight?

Mr. Cashatt: Your Honor, with the amount of evidence that has gone in, it is going to take time even if we try to speed it up.

The Court: I know, it is just taking a long time, but I think we better run until 5.

Mr. MacGillivray: How about a little night work? I think we are all agreeable if the Court is.

The Court: Perhaps we should have a night session tomorrow night then if you are not getting along faster than you appear to be now. I think that would be preferable to trying to recess this now. The jury gets out and forgets all about the testimony, and that makes a miserable situation if you have to wait that long to finish a case.

Mr. McKevitt: Well, I don't know to whom it would be detrimental if we were penned up around the 4th of July. Take a guess on that one.

(Off-the-record discussion.) [507]

(Whereupon, the following proceedings were had in open court in the presence of the jury:)

Mr. Etter: Mr. Elsensohn.

JAMES ELSENSOHN

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Will you state your name, please? A. James Elsensohn.

(Testimony of James Elsensohn.)

Q. Where do you live, Mr. Elsensohn?

A. I live here in town, 4605 North Addison.

Q. And you live there with your family?

A. Yes, sir.

Q. Of what does your family consist?

A. My wife, a daughter who has just left home for Washington, D. C., and a son.

Q. A son who is home with you?

A. At home now.

Q. How long, Mr. Elsensohn, have you resided here in Spokane? A. Since 1933.

Q. Since 1933? [508]

A. And 4 years previously, out in the Valley.

Q. You refer to the Spokane Valley?

A. Yes, sir.

Q. What is your present occupation, Mr. Elsensohn?

A. I am a teacher at John Rogers High School.

Q. In addition to your duties as a teacher, do you perform any other services?

A. I have been an athletic coach most of the time. I am not currently an athletic coach, however.

Q. You are not currently in athletics as a coach?

A. That's right.

Q. Directing your attention to 1951 and '52 or thereabouts, were you then engaged in athletic coaching activities?

A. I was coaching track at that time.

Q. You were track coach at John Rogers High School? A. Yes, sir.

(Testimony of James Elsensohn.)

Q. And how long have you been engaged in athletic work as a coach?

A. I took my first job as athletic coach at Central Valley High School in 1929.

Q. And were you continuously, then, engaged in coaching work up until you ceased a few years ago?

A. Except for a few years while I was in the Navy.

Q. You were in the naval service?

A. Yes, sir. [509]

Q. And other than that time, you have been actively engaged in athletics?

A. Until two years ago.

Q. Has your coaching extended beyond track, or have you had some other sports?

A. Sir, I have coached all sports except baseball.

Q. Except baseball? A. Except baseball.

Q. Do you know Gerry Stintzi, Mr. Elsensohn?

A. Yes, sir, I have known Gerry Stintzi since about 1950.

Q. Since about 1950. And when you first met or knew Gerry, where was he in school?

A. Yes, sir, he was a student at Hamilton Grade School, I believe.

Q. At the Hamilton Grade School?

A. Yes, sir.

Q. And how was it that you had occasion to meet him then?

A. Well, I found him turning out for track up on our Rogers High School track. He had his own track shoes and just for his own interest and be-

(Testimony of James Elsensohn.)

cause he liked the sport, was turning out, and I questioned him about why he was up there at that time.

Q. And that was when he was still a grade schooler? A. Yes, that's right.

Q. And, I gather, he was turning out with your track team [510] up there, working out with them?

A. Yes, then and afterward.

Q. Then and afterward. Did he later enter John Rogers High School as a freshman?

A. Yes, sir, he did, the fall of 1950.

Q. And did he turn out for the track team at Rogers?

A. Yes, he turned out for both cross-country in the fall and track in the spring, and he also partipicated in football.

Q. Have you had occasion, Mr. Elsensohn, during the years in which you have coached athletics, placing particular emphasis now on the track part of athletics, have you coached a considerable number of youngsters who were trackmen, that is, who ran the same distances as Gerry?

A. Yes, I have.

Q. And his distance was the mile, principally?

A. That's right, although I think there are a number of events he could have participated in and done very well.

Q. Very well. But you have coached a number of youngsters in track during your time?

A. Yes, I have.

Q. And could you state what your opinion is

(Testimony of James Elsensohn.)

with respect to Gerry's ability as a trackman when you first came to know him in the 8th grade and as a freshman at Rogers [511] High School?

A. Well, he made quite an outstanding impression on me when he was still in the 8th grade for the reason that he was able to do almost as well or as well as some of my varsity boys who were juniors and seniors in high school. And so I, of course, had my eye on him when he came to Rogers and, as far as I knew, he is the only freshman who ever made his letter as a freshman in the distances at Rogers.

Q. At Rogers?

A. At Rogers. It is a very rare thing, and Gerry made it, as I recall, in cross-country that year he entered as a freshman, and, of course, he did very well as a freshman in the spring in track.

Normally, we do not allow freshmen to participate with the varsity because they have their own league. Once in awhile a boy comes along that, because of ability or because of maturity, for some other reason, we think should be with the varsity. He was one of those few and rare instances.

Q. Mr. Elsensohn, having in mind your experience in coaching high school track athletes, your knowledge of Gerry Stintzi and working with him as a trackman and as a freshman at Rogers High School, could you give us an opinion as to his prospects for future track work by [512] comparison with other individuals and youngsters that you have coached during your athletic career?

(Testimony of James Elsensohn.)

A. It is always difficult to predict an athlete's future, but on the basis of what he did as a freshman and sophomore, I thought that he had an outstanding future.

Q. An outstanding future.

Mr. Etter: That is all.

Mr. Cashatt: No questions, sir, that is all.

(Witness excused.)

Mr. Etter: Mr. Hagin, will you come forward, please?

WALLY HAGIN

called and sworn as a witness on behalf of the the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Will you state your name, please? A. My name is Wally Hagin.

Q. Where do you reside, Mr. Hagin?

A. North 1229 North Division.

Q. How long have you resided there?

A. About six months at that particular address.

Q. How long have you been a resident here in Spokane? A. Since 1918.

Q. Since 1918. What is your present occupation, Mr. Hagin? [513]

A. I am a photographer.

Q. And how long have you been a photographer?

A. Since 1948.

Q. Since 1948? A. Right.

Q. And what type of work do you do as a photographer, Mr. Hagin?

(Testimony of Wally Hagin.)

A. I do both portrait and commercial.

Q. You do both portrait and commercial work?

A. Yes, sir.

Q. That is, of all types? A. That's right.

Q. Do you do all of the various acts and services that are performed with photography other than merely taking pictures? A. I do.

Q. You do. And you have been doing that for how long? A. Since 1948.

Q. And in your work, have you done likewise various colors, brown and white—black and white—and Kodachrome or colored work?

A. I have.

Q. Is that correct? A. That is correct.

Q. And have done that for a number of years?

A. That's right.

Q. And are presently engaged in that work?

A. Correct.

Q. Mr. Hagin, are you acquainted with Gerry Stintzi who is seated here? A. Yes, sir.

Q. And did you have occasion to see him possibly two weeks ago?

A. That's right, I did, I took pictures of him, of his condition, after his accident.

The Clerk: Your Honor, I have marked Plaintiff's 26 through 33 for identification.

Q. (By Mr. Etter): These photographs that you took, Mr. Hagin, do you recall, can you tell us the date that you took them?

A. It was June 10th, 2 p.m.

Q. June 10th at 2 p.m., of what year?

(Testimony of Wally Hagin.)

A. 1954.

Q. 1954. And after you took these pictures, what did you do with the negatives?

A. After processing them, I gave them to you.

Q. After processing them, you delivered them to me, is that correct? A. Correct.

Q. Without telling us anything about what appears in the [515] negative, I am handing you Plaintiff's Exhibit 26 and asking you if you recognize that? Just a yes or no? A. Yes.

Q. I will ask you if that is one of the pictures that you took on June the 10th at about 2 o'clock of the year 1954? A. That is correct.

Q. Of Gerry Stintzi? A. Yes.

Q. Handing you at this time Plaintiff's Exhibit No. 27, will you examine that and tell me whether or not you recognize what it represents?

A. Yes, I do.

Q. And did you take that picture on or about June 10th? A. It took it on that date.

Q. Of Gerry Stintzi? A. Correct.

Q. Handing you Plaintiff's Exhibit 28, I will put these right in front of you Mr. Hagin——

A. All right.

Q. ——28, 29, 30, 31, 32 and 33 for identification, and ask you to examine all of them and tell me what they are without going into an explanation of what they represent.

A. Those are all pictures I took of Gerry Stintzi. [516]

Q. On June 10th? A. June 10th.

(Testimony of Wally Hagin.)

Q. I will ask you whether or not these pictures —how are they taken, in what shade?

A. Well, they are taken in their natural colors, just the conditions as they were at that particular time.

Q. At that particular time. Can you tell me whether or not these are accurate representations of Gerry Stintzi and the particular areas that are depicted by the pictures?

A. They are exactly as the conditions were at that time.

Q. And you saw him at that time, of course?

A. Yes, I did.

Q. And have examined these since?

A. Yes, I have.

Q. And are they such accurate representations of that condition? A. Exactly.

Q. They are. Likewise, Mr. Hagin, do you handle projection work? A. I do.

Q. And how long have you handled that type of work?

A. About the same period, since 1948.

Q. Can you tell me whether or not these exhibits for identification, being Plaintiff's 27 to 33, inclusive—— [517]

Mr. McKevitt: 26, is it not?

The Clerk: 26.

The Court: 26 to 33.

Mr. Etter: 26 to 33, yes.

Q. Can you tell me whether or not by projection, Mr. Hagin, these slides or exhibits or rather

(Testimony of Wally Hagin.)

identifications, can you tell me, do they accurately reproduce as to the situation and condition which you photographed and which is shown by those exhibits? A. They will.

Q. When projected on a screen?

A. Correct.

Mr. Etter: That is all, Mr. Hagin.

(Witness excused.)

Mr. MacGillivray: Dr. Valentine.

HOWARD V. VALENTINE

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. MacGillivray): Your full name, Dr. Valentine?

A. Howard V. Valentine.

Q. And you are a physician and surgeon?

A. That is correct. [518]

Q. Practicing here in Spokane?

A. Yes.

Q. With offices in the Old National Bank Building? A. Yes.

Q. You office with Dr. Tousey and——

A. Jacobson.

Q. Pardon? A. Jacobson.

Q. And how long have you been admitted to practice in the State of Washington?

Mr. McKevitt: We will admit the doctor's general qualifications.

(Testimony of Howard V. Valentine.)

Mr. MacGillivray: Fine.

Q. Doctor, you know young Gerry Stintzi?

A. Yes, I do.

Q. Did you have occasion to treat him as a patient? A. I did.

Q. When did you first see Gerry?

A. I first saw him the evening of his injury, shortly thereafter. I saw him the evening of his injury shortly after his injury. I first saw him at the Sacred Heart Hospital.

Q. July 17, 1952? A. That is correct.

Q. Do you have any records, Doctor, that you can refer to [519] as we go along?

A. Yes, I have.

Q. It might hurry things up. What time on July 17th did you see him?

A. At approximately 9 p.m.

Q. And where did you see him?

A. I saw him first at Sacred Heart Hospital.

Q. In what room there?

A. I was called by phone informing me that this man was seriously injured with a serious leg injury. I had instructed the hospital to admit him directly to the surgery, so I saw him in surgery.

Q. And would you tell the jury here, Doctor, and speak up, just what his condition was when you first saw him?

A. The boy was in profound shock as a result of his injuries. He was practically pulseless, he was in a cold, clammy, shocked condition. He was semi-conscious and obviously had lost a considerable

(Testimony of Howard V. Valentine.)

amount of blood. He had numerous obvious injuries, including a traumatic amputation of the right leg in the thigh region near the hip. He also had a fracture of the left thigh bone; he had both bones of the right forearm compound fracture.

Q. What is a compound fracture?

A. Meaning where the skin over the region of the bones has [520] been disrupted, the region of the fracture.

Q. The bone sticking through the skin?

A. The bones were not actually sticking through the skin, but the skin soft tissues over the site of fracture were disrupted.

Q. What about the fracture of the left leg?

A. The fracture of the left leg was near the junction of the middle and upper thirds and was a complete fracture.

Q. Was that a compound or comminuted fracture?

A. That was a comminuted but not compound fracture.

Q. What does "comminuted" mean?

A. Comminuted means that there are more than two fractures and the fracture lines extend to make at least three fracture lines.

Q. Then was the right leg still attached at the hip, or just describe it briefly, what the situation was?

A. The right leg, which had been the most seriously injured, was attached only by a thin margin of skin to the hip. The tissues were obviously con-

(Testimony of Howard V. Valentine.)

siderably crushed and macerated. There was considerable amount of dirt and gravel ground into the wound. There was a loss of skin over the lower right abdomen, extending above the hip, and the wounds extended into the rectum, posteriorly, and the scrotum, anteriorly. [521]

Q. What other conditions did you find?

A. The wound extending into the scrotum had produced a rupture of the urethra.

Q. And what else in that region?

A. Pardon me?

Q. What other condition was there in that region?

A. And produced also an opening up of the scrotum, with consequent evulsion of the right testicle.

Q. Were there any internal injuries?

A. The internal injuries consisted primarily of the injury to the bladder outlet, outlet of the bladder, and a fracture involving the right pelvic bone and, of course, considerable contusions and abrasions about the abdomen and, consequently, probably some internal hemorrhage.

Q. Was the bladder ruptured?

A. Beg your pardon?

Q. Was the bladder ruptured?

A. At its outlet.

Q. I see. Then, Doctor, will you just go ahead and tell us all about his condition and what you did that first or second day?

A. Well, on the day, on the evening of admis-

(Testimony of Howard V. Valentine.)

sion, the first treatment, obviously, was to relieve his pain and overcome the shock. This was done by giving the boy [522] morphine for his pain and immediate plasma for his shock, obtaining blood as rapidly as possible, typing him and obtaining the blood. This was all done while he was still on a stretcher in the operating room, because his condition did not permit further treatment until the shock had been combatted.

He was given several infusions of plasma, followed by several pints of blood, and when his general condition permitted it, he then was moved to the operating table where he was anesthetized and a re-amputation of the right thigh was conducted at a site perhaps four inches above the site of the traumatic amputation. There was not sufficient skin to cover this area, so this was a so-called guillotine operation.

Q. What do you mean by a guillotine re-amputation?

A. That means without an attempt to close the soft tissues over the remaining bone. The soft tissues were simply divided and the bone divided at a region about four inches above the original site of injury and the devitalized tissue of the wound was removed. The lacerations extending into the rectum and scrotum were repaired; a pin was placed through the left leg below the knee for traction for the fracture of the left femur; the right forearm fractures were manipulated and a plaster cast applied; and the bladder was opened, [523]

(Testimony of Howard V. Valentine.)

a drain placed from the bladder through the urethra to the outside, and a drain placed also from the bladder directly upward to provide adequate bladder drainage. The right stump was dressed with pressure, and the patient then was removed to a room.

Q. Now Doctor, from your experience, you have seen a lot of traumatic cases, I take it?

A. Yes.

Q. From your experience, what would you say as to the extent of Stintzi's injuries as to other cases you have seen?

Mr. McKevitt: That is objected to on the ground of comparison with other injuries.

The Court: Yes, I will sustain the objection.

Mr. McKevitt: Your Honor ruled on a similar question.

The Court: I will sustain the objection. I think it should be described without comparisons.

Q. (By Mr. MacGillivray): What opinion did you have that night as to the extent of his injuries and the seriousness of them?

A. They were very extensive injuries and, of course, at first considered very critical.

Q. Did you at that time despair of his life?

A. Well, I think anyone would with a similar situation. [524]

Q. I see. Then when did he regain consciousness after this operative procedure, do you know?

A. Well, I couldn't be too exact in that, but I would say that the following morning when I ex-

(Testimony of Howard V. Valentine.)

amined him he was conscious, had a level of consciousness which permitted him to answer questions.

Q. Then what was his condition for the next few days as to pain and suffering he went through?

A. Of course, he had considerable suffering. It was relieved insofar as we were able to do so and in our judgment judicious to do so. He remained in a critical condition for some days afterwards.

Q. Was he given opiates, sedatives?

A. He was given opiates at regular intervals.

Q. And did they relieve him complete of the pain and suffering? A. Not completely.

Q. Then when was your next operative procedure? Doctor, I have here a part of the hospital record. A. Oh.

Q. That might be of help to you.

A. If it runs chronologically, it may be some help.

(Document handed to witness.)

On the 23rd——

Q. Of July? [525] A. Of July.

Q. What was done on that date?

A. On that date pins were placed in the left thigh bone to initiate reduction of the fracture of the left bone which had previously just been treated by traction, and also the wound of the right thigh was redressed and he was given a blood transfusion.

Q. Then on July 28th, was he taken again to surgery?

A. On July 28th he was taken again to surgery, where the cast on the right forearm was removed,

(Testimony of Howard V. Valentine.)

the wounds were cleansed and the fractures of the forearm were again manipulated in an effort to obtain better reduction, and the fractures of the left thigh were again manipulated and placed in an external fixation apparatus.

Q. On that date, Doctor, was there a disarticulation of the right femur at the hip joint?

A. That is correct, on that date there was a disarticulation of the remaining stump of the right leg at the hip joint.

Q. And by disarticulation of the right stump, what do you mean?

A. I mean disengaging and disarticulating the ball from the socket in the hip joint.

Q. Then these procedures were all under general anesthetic? [526]

A. These were all under general anesthetic.

Q. Then the next operative procedure, Doctor? Doctor, you have given me a written report?

A. If these are chronological, that is fine.

(Another document was handed to the witness.)

The next procedure after the 28th was on the 4th of August. No, let's see here. No, I think—oh, yes, on the 4th of August, under general anesthesia, the right forearm was opened and the right radius and ulna were proximated under open operation and bone plates applied.

Q. What do you mean by "bone plates?"

A. That means bringing the fractures into ap-

(Testimony of Howard V. Valentine.)

position and holding them by means of a metal plate held in place by metal screws.

Q. And how many metal plates were put in the right forearm of Gerry Stintzi on that date?

A. Two.

Q. Would that be one on each bone in the forearm?

A. One on each bone of the right forearm.

Q. Go ahead, then, Doctor.

A. And, at the same time, redressing of the disarticulation of the right hip was carried out under anesthetic.

Q. As I understand it, Doctor, in this hip procedure, there was no skin to be applied over the open wound? [527]

A. That is correct, there was no skin over the lower third of the right abdomen. It was all destroyed in the accident. We had no flaps to use to cover the raw areas produced by amputation and disarticulation.

Q. How was bleeding stopped?

A. Bleeding was stopped by the use of pressure and, of course, ligation of all the major vessels, which were done at the first operation.

Q. That is, sewing the vessels?

A. That is tying of the vessels.

Q. Tying of the vessels. Then, later on, some grafting from skin on other parts of his body to this hip region was commenced?

A. That is correct. After the raw area overlying the disarticulation site had granulated and de-

(Testimony of Howard V. Valentine.)

veloped clean, healthy tissue sufficiently, then it was possible to carry out skin grafting.

Q. When did you start the grafting?

A. The first grafting was done on the 13th of August.

Q. And the skin you used in that graft was taken from where and placed where on his body?

A. The skin used was taken from the abdomen from the level of the chest. All the healthy areas of skin were borrowed from to find skin to cover the raw area over the disarticulation. [528]

Q. Then the healthy skin would be taken off of the abdomen and put on the hip, is that it?

A. That is correct.

Q. How much skin would you graft at one operation?

A. Well, we had a problem here because, first of all, we had an area that wasn't smooth, an area that still retained some infection, but it was a constant source of loss of serum, so we elected to do this by means of pinch skin grafts, which meant we took small pieces of skin half the size of a dime off the abdomen and placed them on the healthiest places on the stump. This had to be done in stages, first of all, because all of the stump wasn't ready for grafting at one time and, secondly, it is a procedure that requires some time and we didn't wish to subject him to too long a time under anesthesia.

Q. Were those grafting operations all under general anesthesia?

A. They were all under general anesthesia.

(Testimony of Howard V. Valentine.)

Q. And continue on after August 13th, then, Doctor.

A. On September 5th, more skin grafting was done to the stump. There was also an infected tract present in the stump area which was explored and opened to permit further treatment while in bed.

Q. September 15th? [529]

A. On September the 5th.

Q. Yes. Well, then, what date did you next have him in surgery?

A. Now, then, I believe our next operative procedure was then on October the 7th, where it developed that in the healing of the fractures of the forearm, nature had been a little over-anxious and had produced a little more callus than we ordinarily see and had bridged across between the two bones, between the two bones of the forearm, and in so doing had fixed the forearm as far as supination and pronation is concerned. The healing taking place in the fractured site was excellent, so it was elected to remove this bony bridge which had grown across between the two bones.

Q. Which to do that, you had to cut into the arm? A. Had to open up the arm.

Q. Open up the arm?

A. The area between the two bones.

Q. That was done on October 7th?

A. October 7th.

Q. Then during this period, were you continuing with your skin grafts, Doctor?

(Testimony of Howard V. Valentine.)

A. Some more skin grafts were placed on the stump at the same date.

Q. If you will continue on, then, what you next did for the [530] patient.

A. The next operative procedure I find was not carried out until the 24th of February of '53, at which time the four pins which had been originally placed in the left thigh bone in the treatment of that fracture were removed.

Q. Are these steel pins that were placed in the left leg? A. They were.

Q. And they were taken out on February 24th?

A. February 24th.

Q. 1953? A. 1953.

Q. Then during all of this period, was Mr. Stintzi given numerous blood transfusions?

A. He had numerous blood transfusions.

Q. Do you know how many in all?

A. Pardon me?

Q. Do you know how many in all?

A. I don't have the figure. Well, I can give you roughly the figure, I can't give you the amount of each.

Q. Well, roughly how many, Doctor?

A. He was transfused on 12 occasions, on 12 different dates, on some occasions, on the first few days, receiving more than one pint, probably two or three pints, but on 12 separate occasions he was transfused. [531]

Q. Then during all of this period up to February 24th you have talked about, what was his con-

(Testimony of Howard V. Valentine.)

dition in the hospital when conscious as to pain and suffering?

A. In the early weeks of his confinement, he underwent a considerable amount of pain. After some healing had progressed in the right stump and after the bones of the right forearm and left thigh were immobilized, his pain was not great.

Q. Then, Doctor, he remained in the hospital until what date?

A. He remained in the hospital, on the occasion of his first stay, from the 17th of July of '52 until March 28, '53.

Q. And he was then released to his home?

A. He was then released to his home.

Q. And was he later returned to the hospital during the year 1953?

A. Yes, on April 25th of '53, he was taken to the hospital as an out-patient only for X-rays on the left thigh bone, femur.

Q. Then again back to the hospital when?

A. Back to the hospital again on the 24th of June of '53 for the same purpose.

Q. The next time?

A. The next admission was on August the 13th, when he was [532] admitted to the hospital again, taken to surgery the following day, and the bone plates removed from the right forearm. He was then discharged on the 17th of August on that admission.

Q. He was in five days at that time?

A. That time he was in for five days.

(Testimony of Howard V. Valentine.)

Q. And was the 17th of this last August the last time he has been confined in the hospital itself?

A. That is correct.

Q. Now has he been under your care, Doctor, ever since his release from the hospital?

A. Yes, he has been under my care.

Q. And he still is under your care?

A. He still is under my care.

Q. What has been the situation, Doctor, since his release from the hospital as to his general well being and what you have done for him and what you have advised him to do and what he has done for himself?

A. Well, of course, when he first left the hospital, he had considerable stiffness in the left knee as a result of the prolonged immobilization of the fractures and his long period of convalescence and bed rest. He was able to be about on crutches with help when he left the hospital and gradually there was a restoration of motion in the left knee. The muscles of the left leg [533] developed rapidly after he was up and about, and he continued to exercise his arms diligently and he soon regained good muscular development in his arms. There did remain a lack of completion extension of the fingers, the index and second finger, particularly, of the right hand as a result of the severity of the injuries associated with the fractures of his right forearm.

Q. Doctor, is that condition of his right hand and right forearm that we saw here Monday, I believe, a permanent fixed condition as of today?

(Testimony of Howard V. Valentine.)

A. There is a lack of improvement of the condition as I have observed it in the last few months.

Q. Would you say that the condition is fixed?

A. I feel it is probably fixed.

Q. How about the left leg as of today, the flexion and extension of his left leg?

A. The extension is 100 per cent. There is a few degrees lacking in complete flexion. The stability of the knee is excellent and the muscular development of the left thigh and calf muscles is excellent.

Mr. McKevitt: Is what?

A. I say the development of the left calf and thigh muscles is excellent.

Q. (By Mr. MacGillivray): Is there some remaining disability of that left leg? [534]

A. There is some remaining disability due to the lack of complete ability to completely flex the knee.

Q. And is that condition fixed, in your opinion?

A. I feel that it is.

Q. Doctor, did Gerry complain to you of some burning sensation when he goes to the bathroom?

A. No. He has some sensory changes about the perineum, about the inner portion of that right disarticulation stump. That is hypersensivity to contact with anything.

Q. Is that problem a fixed condition?

A. That could be probably alleviated by some method or other.

Q. Beg your pardon?

(Testimony of Howard V. Valentine.)

A. That might be alleviated or it may spontaneously disappear.

Q. And, Doctor, what is the condition as of today of the right stump?

A. The right stump, necessarily, is an irregular stump because of the nature of the original wound. It is well healed in all respects except over a small area perhaps the size of a dime in its most appended portion, where from pressure there has developed a little excoriation of the skin, meaning that just to the *kepth* of the skin in that particular area there develops a blister or a [535] sore very easily.

Q. Doctor, does he continue to have pain and discomfort from the area of that stump?

A. I don't feel that he has any pain and discomfort except where pressure is applied to it, and that, I think, is primarily due to the small area where this blister developed, that and the hip's sensitivity, the hip's sensitivity probably due to some skin nerve or some sensory nerve close to the surface of the stump.

Q. Well, Doctor, do you know whether or not Gerry was fitted with a prosthesis or artificial leg?

A. He was.

Q. About when was that?

A. Beg pardon?

Q. About when was that, if you recall?

A. Well, that was approximately—I couldn't give you the exact date on that, but I would think that that was probably three months after his orig-

(Testimony of Howard V. Valentine.)

inal discharge from the hospital, two to three months.

Q. And has that artificial leg been changed from time to time?

A. There have been adjustments made in it, I couldn't say how many.

Q. And to your knowledge, has Gerry conscientiously tried to adapt himself and to use that artificial leg? [436]

A. He has used it, how much I am unable to say. I have tried to encourage him to use it continuously, but because of the fact that he was in school and, naturally, there is an awkwardness to an artificial limb and it takes a long time to learn to use them, especially at that level. I don't know how much of the time he has actually used it.

Q. And, Doctor, the pressure you refer to that has caused these ulcerations or sores on the stump, is that the pressure from use of the artificial leg?

A. I think it is, uh-huh.

Q. Well, Doctor, how often do you see Gerry?

A. Well, after he was discharged from the hospital, I saw him at weekly intervals for a number of months, and then every couple of weeks, and finally about once a month.

Q. And to your knowledge, Doctor, from seeing him after he got this artificial limb, has he ever been able to use it with satisfaction or comfort?

A. Well, the last time that he wore it into the office to see me, he was using it better than he had at any previous time.

(Testimony of Howard V. Valentine.)

Q. Well, you know that he had to quit wearing it sometime, Doctor?

A. I know he has quit on occasions. [537]

Q. Yes. And, Doctor, do you have any opinion as to whether or not in the future Gerry will be able to satisfactorily use and adapt himself to any artificial contrivance such as a leg?

A. I have no opinion.

Q. You have no opinion. Doctor, your statement for your services, I believe, was in the sum of some $3,000? A. That is correct.

Q. And that is a fair charge for all the work you have done these past two years?

A. I feel that it is.

Q. You have done an awfully good job, haven't you, Doctor, with Gerry?

A. I am not the judge on that.

Q. Doctor, have you seen these color photographs that were taken of Gerry's body a week or so ago? A. Yes.

Q. And are they accurate representations of the condition of his body as it exists today?

A. I think they are.

Mr. Etter: These have not been admitted, your Honor, but at this time, having been identified, I will move their admission.

The Court: Have counsel seen them?

Mr. Cashatt: May we approach the bench, your Honor? [538]

The Court: Yes.

(Whereupon, the following proceedings were

(Testimony of Howard V. Valentine.)

had before the bench, in the presence, but out of the hearing of the jury:)

Mr. Etter: I was going to make a short statement to the jury that probably some of those views wouldn't be appetizing, but I'm afraid if I did, it might be objected to as a comment to the jury. I don't know that I should do that, but your Honor might state to them on the admission of the exhibits the purpose of them.

Mr. McKevitt: I don't know how far you want them to go.

Mr. Etter: I won't say anything if the Court says it. It is just a cautionary measure, making that statement to the Court.

Mr. McKevitt: I know, but counsel is seeking a ruling from the Court in advance. If you want to take a chance on it, I suggest that you do it.

Mr. Etter: We will run the pictures.

The Court: I don't see how I could very well comment on them without perhaps overemphasizing them. I think you should be permitted to make your objection in the absence of the jury, if you wish, to this whole procedure so far as showing the slides is concerned. [539]

Mr. Cashatt: Yes. And, your Honor, the defendant objects to the showing of the slides with the equipment that is now in the courtroom. I believe, for the purpose of the objection, that possibly the record should show the equipment that is being used. I would like the record to show that.

The Court: Yes, all right.

(Testimony of Howard V. Valentine.)

Mr. Etter: Correct, we will stipulate to that.

Mr. Cashatt: May I ask one more question for the stipulation? Counsel, what type of screen is that that they are being showed on?

Mr. Hagin: Standard beaded screen.

Mr. Cashatt: Made of what material, please?

Mr. Hagin: Of beads.

The Court: I think your stipulation should show, too, that the operator of the machine is the prior witness here, Mr. Wally Hagin.

Mr. Cashatt: We will so stipulate, counsel.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Mr. Etter: Is there a ruling made, your Honor, on the exhibits which I have just offered?

The Court: Yes, they may be admitted.

Mr. Etter: 26 to 33 may be admitted.

(Whereupon, the said colored slides were admitted in evidence as Plaintiff's Exhibit 26 to 33, inclusive.)

The Clerk: I have marked 34, 35 and 36, your Honor.

Mr. MacGillivray: Your Honor, I ask the admission of Plaintiff's Exhibit No. 34, which is the hospital bill of Gerry Stintzi, showing a total hospital account of $6,678.98, which counsel has seen.

The Court: Is that your No. 34?

Mr. MacGillivray: Yes.

The Court: Is there any objection to that?

Mr. Cashatt: No objection.

The Court: It will be admitted. [543]

No. 14629

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a corporation, Appellant,

vs.

CLARA STINTZI, Guardian Ad Litem for Gerald Stintzi, a minor, Appellee.

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VOLUME II.

(Pages 465 to 920, inclusive.)

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(Testimony of Howard V. Valentine.)

(Whereupon, the said hospital bill was admitted in evidence as Plaintiff's Exhibit No. 34.)

Mr. MacGillivray: And ask the admission of Plaintiff's Exhibit 35, the statement from Schindlers Artificial Limb Company in the sum of $662.81, the cost of artificial limb work.

Mr. Cashatt: No objection.

The Court: Has that been marked by the Clerk and numbered?

Mr. MacGillivray: No. 35.

The Court: 35.

Mr. Cashatt: No objection.

The Court: It will be admitted.

(Whereupon, the said statement was admitted in evidence as Plaintiff's Exhibit No. 35.)

Mr. MacGillivray: No. 36 is receipts and checks paid to various special nurses for special nursing given to Gerry Stintzi while in the hospital, totaling $2,164.00. [544]

Mr. Cashatt: No objection.

The Court: It will be admitted.

(Whereupon, the said receipts and statements were admitted in evidence as Plaintiff's Exhibit No. 36.)

The Court: Are you ready to show those?

Mr. MacGillivray: Yes.

Q. Doctor, we are going to show these pictures. Could you explain them to the jury for us, just what they show? A. Yes.

(Testimony of Howard V. Valentine.)

The Court: I think I will take a short recess before we proceed with that. I want to finish tonight, if you prefer to do so.

The Witness: I would, Judge.

The Court: We will recess, then, for about five or ten minutes.

(Whereupon, a short recess was taken, after which the following proceedings were had before the bench out of the presence of the jury:)

Mr. Etter: May we approach the bench?

The Court: Yes. [545]

The Court: For counsel's guidance here in the matter of getting your witnesses—of course, I have no means of telling how nearly you are getting to the end of your case or what——

Mr. Etter: We have only one more witness, I believe, your Honor.

Mr. McKevitt: Are you through with Dr. Valentine?

Mr. Etter: He is going to explain these.

The Court: You have one more?

Mr. Etter: That witness is available and we can finish in short order.

The Court: Rather than have a night session, I think perhaps we would cover just as much ground, I have in mind tomorrow convening at 9:30. I have a dental appointment at 9 so that 9:30 is the best I can do. It crowds things a little bit. I had to get down there at 12:30 today. At any rate, I propose to convene at 9:30 in the morning and run until 12, and then from recess until about

(Testimony of Howard V. Valentine.)

6 o'clock tomorrow night, and then that way we can get in four hours in the afternoon, which is a California day in Federal Court.

Mr. Cashatt: If your Honor please, may the record show that the stipulation entered into with counsel concerning the equipment, and so on, was made for the purpose of supporting the objection which the defendant has raised to the showing of the pictures here? [546]

The Court: Yes, that may be understood and, of course, it isn't to be construed as any waiver of your objection. That is what you had in mind?

Mr. Cashatt: That is correct.

The Court: All right, bring in the jury, then.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: All right, proceed.

Mr. Etter: These are exhibits, ladies and gentlemen, from 26 to 33, inclusive. Exhibit 26.

Q. (By Mr. MacGillivray): Dr. Valentine, showing you on the screen what is Plaintiff's Exhibit 26, would you explain to the jury just what that shows?

A. That shows, viewing from behind, the right thigh. As we can understand, these are prints from the negatives so it looks as though it is the left, but it is the right thigh at the site of the amputation viewed from behind.

Mr. Etter: Exhibit 27.

Q. (By Mr. MacGillivray): One question, Doctor, at the bottom of the right thigh shown in Ex-

(Testimony of Howard V. Valentine.)

hibit 26 seems to be a bandage of some sort. Is that covering an ulcerated—— [547]

A. That is a Band-Aid, I believe, covering the area of the most appended portion of the amputation where a blister developed.

Q. Showing you on the screen what is marked as Plaintiff's Exhibit 27, Doctor, just what does that show?

A. That shows the left thigh, with dimpling of the skin in the four areas along the outer aspect, those being the site of the pin insertions for reduction and treatment of the fracture of the left thigh bone. It also shows some areas from which skin has been removed from the abdomen.

Q. Those four areas on the left thigh, are they indentations or kind of holes in the——

A. They are indentations in the skin where the tissue contracted down and caused the dimpling of the skin at that area.

Mr. Etter: Exhibit 28.

Q. (By Mr. MacGillivray): Showing you, Doctor, what is marked as Plaintiff's Exhibit 28 on the screen, just what does that exhibit show?

A. That exhibit shows the disarticulation of the right thigh, the disarticulation stump viewed from in front, and also shows the areas of the abdomen from which skin was removed to cover this stump.

Q. And skin was taken from the abdomen up how far? [548]

A. To the rib margins and slightly above.

Q. Up to the ribs?

(Testimony of Howard V. Valentine.)

A. Rib margins and slightly above.

Mr. Etter: Exhibit 29.

Q. (By Mr. MacGillivray): Showing you on the screen, Doctor, Plaintiff's Exhibit 29, just what does that show?

A. That again shows the disarticulation stump, shows the donor sites or the areas from which the skin grafts were taken, and shows a scar on the right lower chest region which was an abrasion occurring at the time of his injury.

Mr. Etter: Exhibit No. 30.

Q. (By Mr. MacGillivray): And showing you on the screen, Doctor, Exhibit No. 30, just what does that show?

A. It shows similar fracture to that shown in the previous film, this view being taken from the side, showing the disarticulation stump, the sites from which the grafts were taken to cover the stump, and the scarred area above the region from where the grafts were taken.

Q. And is that scarring on the stomach there a permanent condition, Doctor?

A. Beg pardon?

Q. Is that scarring on the stomach shown there a permanent condition?

A. Yes, that from which the grafts were taken, as well as [549] that other scar, are permanent, because the pigmented areas of the skin are removed in the grafts.

Q. How many actual skin grafts did you take off that scarred area?

(Testimony of Howard V. Valentine.)

A. I don't have the slightest idea, I didn't count them.

Q. A few or very many?

A. A great many.

Q. A great many. Very well.

Mr. Etter: No. 31.

Q. (By Mr. MacGillivray): Exhibit No. 31 shown on the screen, Doctor, shows what?

A. It shows what we have seen previously in regard to the trunk and the amputation stump; also shows the scars, and in the right forearm on the outer aspect the site of the open operation for reduction of both bone fractures of the forearm, and the same scar, being for removal of the plates at a later date.

Q. The various scars on that right forearm from the elbow region down are the sites of your operative procedure on that forearm?

A. You only see one operative site there. The other scars were scars from the injury.

Q. Scars from the dragging, scars from the injury.

Exhibit No. 32 shown on the screen, Doctor, shows what? [550]

A. Similar to the previous film, showing again the disarticulation stump, the donor sites and the scarring.

Mr. Etter: 33.

Q. (By Mr. MacGillivray): 33 shown on the screen, Doctor, depicts just what?

A. Shows much that has been shown before,

(Testimony of Howard V. Valentine.)

plus the wound in the lower mid-portion of the abdomen, the site of the operation to drain the bladder.

Q. Is that the scar or irregular area shown just above the upper left leg on the stump?

A. No, the scar I speak of is the scar just below the navel.

Q. And then to the left of that on the picture appears to be a scar, Doctor. Is that a scar or what is that? A. On the left as we view it?

Q. Yes?

A. That is another area that was grafted for skin.

Mr. MacGillivray: That is all.

The Court: Take the stand again, Doctor.

Let's see, Mr. Hagin hasn't been cross-examined, either, has he?

Mr. Etter: No, he has not.

The Court: He will have to stay here, then. You wish to conclude with Dr. Valentine first. Are you through with the direct examination of Dr. Valentine? [551]

Mr. MacGillivray: Yes.

Mr. McKevitt: We have no cross-examination.

Mr. MacGillivray: That is all, Doctor.

The Court: You may be excused, then, if that is the case, Doctor.

The Witness: Thank you, your Honor.

(Witness excused.)

The Court: Do you have any cross-examination of Mr. Hagin?

(Testimony of Howard V. Valentine.)

Mr. Cashatt: No, your Honor.

The Court: No cross-examination?

Mr. Cashatt: No cross-examination.

The Court: All right, Mr. Hagin may be excused, then, when he gets his paraphenalia together.

(Witness excused.)

Mr. Etter: Mrs. Stintzi, will you take the stand, please. [552]

CLARA M. STINTZI

called and sworn as a witness on her own behalf, testified as follows:

Direct Examination

Q. (By Mr. Etter): Your name is Clara M. Stintzi? A. Yes, it is.

Q. Mrs. Stintzi, there isn't anybody going to hear you if you talk like that. A. Yes, it is.

Q. All right, you speak up so the people on the end can hear. You have been here and you know how hard it is to hear. A. Yes.

Q. You live at 420 East Olympic here in Spokane? A. Yes, I do.

Q. And you are the mother of Gerald Stintzi?

A. Yes.

Q. And his guardian ad litem in this action?

A. Yes, sir.

Q. You have two other children in the home with you, the young boy, who is 14, and the daughter, 10; is that correct? A. Yes, I have.

(Testimony of Clara M. Stintzi.)

Q. And you have been in Spokane about how long, Mrs. [553] Stintzi?

A. About, I imagine, 14 years. About that.

Q. About 14 years. Were you in Spokane when the accident occurred to Gerald?

A. I was called to Minneapolis, Minnesota.

Q. You were at Minneapolis, Minnesota?

A. Yes, sir.

Q. And where were the other two children?

A. They were with me.

Q. In Minneapolis? A. Yes, sir.

Q. And when you went back to Minneapolis, where was Gerald? A. Gerry stayed here.

Q. Stayed here with Ray Davis?

A. Yes, sir.

Q. During the time you went to Minneapolis, is that correct? A. Yes, he did.

Q. Now, Mrs. Stintzi, after this accident occurred, had you returned to Spokane shortly after?

A. I flew back just as soon as I heard.

Q. You flew back? A. Yes.

Q. And when did you arrive in Spokane, that is, with relation to the accident which happened on July 17th? [554]

A. The following evening about 8 o'clock.

Q. The following evening about 8 o'clock?

A. Yes.

Q. And after you returned to Spokane, where did you go? When you got back to Spokane?

A. I went home—oh, I went right straight to the hospital.

(Testimony of Clara M. Stintzi.)

Q. You went to the Sacred Heart Hospital?

A. Yes, I did.

Q. And did you see Gerald at that time?

A. Yes, I did.

Q. And you saw his condition?

A. Yes, I did.

Q. Was he conscious then?

A. He was in deep shock.

Q. Beg pardon?

A. He was in deep shock.

Q. I see. Now will you tell us, were you in attendance or not with him up there at the hospital?

A. I stayed with him night and day all the time.

Q. You were with him night and day?

A. Yes.

Q. Do I understand that you stayed right at the hospital?

A. Yes, I did, and helped take care of him.

Q. And how long, Mrs. Stintzi, did you stay with your son [555] at the hospital night and day? How many days, do you recall?

A. Oh, yes, I imagine a good two months that I would just go out just long enough to eat or something.

Q. Did you leave the hospital during that time?

A. Oh, just over to the—I had my other two children staying about two blocks away. I would run over there to see how they were.

Q. I see. A. Then right back.

Q. Did you do something toward assisting Gerald?

(Testimony of Clara M. Stintzi.)

A. Yes, I would help give packs to his stump.

Q. Have you had some training in that work?

A. Yes, I am a graduate nurse.

Q. You are a graduate nurse? A. Yes.

Q. And you did work up there for Gerald and assisted, is that right? A. Yes, I did.

Q. During all of this time? A. Yes.

Q. And after these first two months or so that you stayed with him day and night, can you tell us then what your usual schedule was in visiting him?

A. Oh, three times a day I would come back. I would get [556] there early in the morning to give him his bath and, of course, the bed pan, why he was kind of embarrassed, so I would help get him on it and clean.

Q. I see, because he didn't want the younger nurses. Speak up, please.

A. Then I would get back in the afternoon before his nap and rub him and see that everything was comfortable. And then in the evening, I would wash him up, and, in fact——

Q. How long did you do that?

A. Until he was dismissed.

Q. Until he was dismissed? A. Yes.

Q. Regularly? A. Yes, I did.

Q. During the time that you were up there, Mrs. Stintzi, of the first two months that you have talked about, the remaining time when you were helping him, did you have a chance to observe his condition as to pain and suffering?

(Testimony of Clara M. Stintzi.)

A. It was intense; in fact, the opiates didn't help.

Q. Did that continue for sometime?

A. For nearly two months, I know a good 9 weeks.

Q. And would that be during both the day and night?

A. Yes, it was. It wore off, within three hours it wore [557] right off.

Q. Were you up with him a considerable part of the evening and night during those first two months?

A. I stayed right by his bedside.

Q. I see. Until he was discharged, I understand?

A. Well, no.

Q. I mean you were there, as you have indicated, until he was discharged?

A. Oh, yes, yes.

Q. And after he was discharged, where was he taken?

A. Right to my home, because he still couldn't walk yet, he required absolute care yet.

Q. All right, who took care of him while he was home? A. I did.

Q. And do you know how long you took care of him, Mrs. Stintzi?

A. Do you mean that he was absolutely helpless?

Q. Yes?

A. Oh, let's see, he came home in March—a good two months.

Q. A good two months?

(Testimony of Clara M. Stintzi.)

A. Nearly, anyway.

Q. And the care that he has received in the two months that he was helpless at home and since that time, up until the present date, has been given to him by whom? [558] A. By me.

Q. And are you still continuing that care?

A. Oh, yes.

Q. What is Gerald able to do now that he was able to do before his injury, Mrs. Stintzi?

A. Well, let's see, swims, but not in public. He goes to the "Y" because it is still embarrassing. And, of course, he goes to outdoor theaters.

Q. I see.

A. Because he can sit in a car.

Q. He hasn't competed in athletics, has he?

A. No. In certain gymnastics he has at the "Y".

Q. As he has indicated in his testimony?

A. Yes.

Q. Is he able to take a bath by himself?

A. No, because, see, when he extends his arm out, the fingers kind of close. Well, the way our bath tub is, you know, it wouldn't fit properly to hold to get in, so then I have to help him in.

Q. You do help him? A. Oh, yes.

Q. Is that regularly? A. Yes.

Q. And what other things do you help him do, Mrs. Stintzi? A. Take his bath. [559]

Q. Beg your pardon?

A. Take his bath, because he falls sideways. It would be pretty awkward.

(Testimony of Clara M. Stintzi.)

Q. That is correct. Any other things besides that?

A. Well, I couldn't leave the house and let him get a meal because he would have to leave his crutches in order to try to cook anything, he would fall.

Q. Does he require considerable care around the home? A. Yes, yes.

Q. That's right. And you are home, are you, quite constantly with him?

A. I don't leave him.

Q. You don't? A. No, I don't.

Q. And what is his situation, and what has it been the last few months, with regard to his sleep, Mrs. Stintzi? Have you been able to observe that?

A. Well, he is nervous. Yes, I can tell when he is awake at night because I come down. He gets too——

Q. What has been his condition?

A. He is very restless. He will go to sleep very tired and he will go sound asleep, but then sometimes he will wake up, you know.

Q. And has that been——

A. Change of weather or that. [560]

Q. Has that been sporadic at different times?

A. Yes.

Q. And does it continue yet?

A. Yes, it does, nerves.

Q. Now have you been able to observe whether he has endured any suffering in the past few months?

(Testimony of Clara M. Stintzi.)

A. Sure, he does. If he is on his leg too long, why, naturally, that bothers him.

Q. You know, of course, about the prosthesis that we secured, that is, this leg, wooden leg?

A. Yes.

Q. Has he tried to wear that?

A. He has tried hard.

Q. And has he been able to use that, Mrs. Stintzi?

A. No, because he can't manipulate it. It just hangs from the hip and then he has to swing his whole body with the straps around here (indicating), you know.

Q. Has he made a diligent effort to use it?

A. Yes, he has, he has tried hard. I thought at first he didn't, but, you know, when he first come home and then when Mr. Schindler said they re-fixed it inside, and then he really tried hard, but it just wouldn't work.

Q. Has he been able to wear it?

A. No, he can't, absolutely not.

Q. Mrs. Stintzi, this care that you have indicated, that [561] has continued since he came home, these various things you have told us, up to the present time? A. Yes, it has.

Q. He has been going, however, to summer school, hasn't he? A. Yes, he has.

Q. And has finished or will finish high school?

A. He will finish.

Q. In this summer school session?

A. Yes, sir.

(Testimony of Clara M. Stintzi.)

Q. Is that correct? A. Yes.

Q. Have you noticed any condition with regard to nervousness, Mrs. Stintzi?

A. He is high strung.

Q. And has that been recently or since this injury? A. Since the injury.

Q. And has it continued until this day?

A. Yes, it has.

Mr. Etter: That is all.

Mr. Cashatt: No questions, Mrs. Stintzi. Step down.

(Witness excused.)

Mr. MacGillivray: Your Honor, I think that is our last witness. Being 5 o'clock, I think we will, I am quite [562] sure we will recess in the morning, might we take a little time tonight?

The Court: I would suggest that you rest with the understanding that if you have some reason to reopen, the Court will favorably consider it.

Mr. MacGillivray: Plaintiff rests.

Mr. Etter: We will rest, then.

(Plaintiff Rests.)

The Court: The jury will be excused, then, until 9:30 tomorrow morning.

Now I am getting a little concerned about the time element here, members of the jury. I am sure we all wish to finish this before the 4th of July and not get fouled up in this long week end, and it may be necessary to have some overtime sessions. It will be necessary, I am sure, and perhaps a night session before we get through, so I am asking

you to come back half an hour earlier tomorrow and we will probably run until about 6 o'clock tomorrow night, if it is necessary.

Well, I think I better excuse the jury until 9:30. Remember, that is half an hour earlier than usual. So you will be excused until 9:30 tomorrow morning. [563]

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: What I had in mind here is that we could get this inevitable motion for directed verdict or for non-suit, whatever you wish to present at this time, out of the way tonight, and then we would either terminate the case or be ready for the jury in the morning.

I misunderstood Mr. McKevitt. He asked if he could be excused, he said he had to put in a long-distance call, and I thought he meant to go out and put in the call and come back. I didn't know he was going for the day.

Mr. Cashatt: I don't believe he will be back, your Honor. I didn't get to talk with him.

The Court: Was he going to make the motion here or argue the motion?

Mr. Cashatt: We both were, your Honor, to divide it.

The Court: I see. Well, I can hear your part of the argument, anyway.

I might say this, that, of course, it hasn't been my policy, and I think the Court of Appeals of the 9th Circuit has definitely indicated that they prefer to have these cases come up with all the evidence

in the record, unless it is an open-and-shut proposition that [564] there is no case for the plaintiff at the end of the plaintiff's case, and, of course, that is only common sense because these trials are expensive and, if there is any doubt about it at all, the sensible thing to do is to let the trial go through and submit it to the jury, and then under the Rules of Civil Procedure we can reconsider your motion for directed verdict at any time or judgment N.O.V., if the case is against you, at any time within 10 days.

Now the thing that I had in mind here that makes it awkward to finally dispose of this case, if I were inclined to do so, at this stage is that there isn't any evidence here as to the relationship between the Northern Pacific and Addison Miller. Your contract isn't in evidence. If they are an independent contractor, there is no evidence of it. This is all the record shows, I think, that that was all railroad property and Addison Miller was out there operating it. I think at this stage I couldn't say that they are independent contractors; I couldn't say that the railroad company wouldn't be bound by the foreman's negligence in not lighting the blue light.

And here we have got proof that this foreman of Addison Miller, who may for all this record shows have been in an agency relationship with the Northern Pacific, ordering this boy across this track and not putting up a blue light to protect him. So that is the situation that you [565] have at this state.

But I don't want to preclude you from making your argument. You may go ahead and argue.

Mr. Cashatt: Your Honor, I hesitate to start it tonight without Mr. McKevitt being here, because I think we could shorten it. There is only going to be one particular phase that we are going to argue, and that is on the question of invitee or trespasser as affecting the duty owed here. As far as on the other phases, where there is a disputed question of fact, I don't think we will argue those.

The Court: What is your contention was the situation of the minor plaintiff here, Gerald Stintzi, on the premises of the Northern Pacific; that is, when he crossed the track to dump the ice?

Mr. Cashatt: At the time, your Honor, and at the place and at the location itself, it is my position that he was a trespasser at that time, and that is the point that we would like to be heard on.

The Court: And if that is the case, you would owe him no duty except to refrain from wilful or wanton injury.

Mr. Cashatt: After knowing of his presence, your Honor.

The Court: Yes, after knowing.

Mr. Cashatt: And we will confine, I think, our entire argument to that, and I would like to let it go over [566] until morning, because Mr. McKevitt has done considerable work on that phase that I haven't.

The Court: Well, I wouldn't want to pass on it in his absence. He just asked if he could be excused and, of course, what he intended was excused

for the day, and I thought he was going out to put in a long-distance telephone call. In view of the time element here, I was trying to save as much time as possible. I should have had the jury come back at 10, I suppose, but then it won't hurt them to wait around. We may get through with this in a hurry.

I just wanted to point out that particular feature of it, that so far as the Addison Miller being an independent contractor, there is no evidence here of what the relationship was, and it would almost seem to me that the natural inference would be that if Addison Miller is there operating this thing and the foreman considered it necessary for them to go out and dump the ice, that they had a right to use the railroad premises for any purpose that was reasonably necessary to carry on their operation. And I don't know, of course, I haven't the contract before me.

Mr. Cashatt: Your Honor, our position on that, of course, is that it is the burden upon the plaintiff to establish and prove——

The Court: Yes, the negligence of the railroad company. [567]

Mr. Cashatt: Also, your Honor, the status of the plaintiff at the time, and I will have some law to cite your Honor, a late Washington case to cite your Honor, on that particular phase of it.

It will be our position that under the facts here, that the plaintiff has not established himself as an invitee at the time and place, other work there, and so on.

The Court: I recently had occasion to go into the law of Washington with reference to the various duties or an owner or occupier of premises toward an invitee, licensee and trespasser, and after going into the law of Washington very thoroughly and hearing the argument of counsel on both sides on the law of Washington, it suddenly dawned on me that this accident was at a race track over the line in Idaho, and I had to back up and start all over again and examine the Idaho law, and so I am fairly familiar with the law of both states now on that point, I think.

Well, the Court will adjourn then until 9:30 tomorrow morning.

(Whereupon, the trial in the instant cause was adjourned until 9:30 o'clock a.m., Thursday morning, July 1, 1954.) [568]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had in the absence of the jury:)

Mr. McKevitt: May I proceed, your Honor?

The Court: Yes.

Mr. McKevitt: May it please the Court and counsel, the plaintiff having rested, the defendant, in conformity with the Rules of Civil Procedure, moves the Court to instruct the jury to return a verdict in favor of the defendant railway company, for the reason and upon the ground there has been a total failure of proof to establish all or any of the material allegations of the amended complaint and/or the statement of the issues, and for the fur-

ther reason that the evidence now clearly demonstrates that at the time of his injuries, the minor Gerald Stintzi was a trespasser, and there is no allegation in the complaint that would justify submitting an issue to the jury on wanton or wilful negligence on the part of the defendant, and, secondly, and apart from that ground, that the plaintiff himself was guilty, or rather the minor was guilty of contributory negligence as a matter of law. [569]

We have a situation here where there is no factual dispute on the question of the type of work that the boy was performing at the time of his injury and the manner in which he was performing that work. The issues of that kind that we generally meet in personal injury cases are totally absent here.

Now I might preliminarily remark, with your Honor's permission, that counsel and myself, Mr. Cashatt and myself, feel that when the issues were finally drawn in this case from the original complaint and the amended complaint and a statement of the issues, that the conclusion was justified that a cause of action could not have been pleaded with more particularity than has been this cause of action, and with your Honor's permission and very briefly, I just want to refer, first, to the amended complaint.

Paragraph III charged that the Addison Miller Company had a contract with the Northern Pacific Railway Company for the performance of car icing operations. Parenthetically, I might remark that no

contract has been introduced and what its terms were are not apparent, and that if it is of any importance in this case, it was the duty of the plaintiff to have produced it, because they have had opportunity to examine it at great length and over any period of time that they chose. And in Paragraph [570] III they said that this young man at all times mentioned was engaged as a laborer in car icing operations.

In Paragraph IV of the original complaint, it is recited that he was engaged in the performance of his duties for this company and, with other employees of such company, was icing railway cars of the defendant, which cars had been spotted by the defendant for such purpose alongside the defendant's icing dock. And further in that same paragraph, it was alleged that we knew or should have known that the cars immediately adjacent to the loading dock were being iced and that the employees of the Addison Miller Company would be engaged in icing operations. And then they recite that on this particular day, while he was engaged in such icing operations, he was standing immediately alongside and partially between two cars, naming them, which cars, in a line of similar cars, had been placed by the defendant alongside of the icing dock of Addison Miller for the purpose of being iced.

Now there can be no question but what when we read that complaint, we had a right to believe that they were going to establish the fact that this boy was actually icing cars at the time that he was injured.

Well, in order to make assurance doubly sure, an amended complaint was filed, and going briefly to an analysis of that and particularly beginning with Paragraph III, [571] it was alleged that this company was engaged in business under and by virtue of a contract with the defendant—we admitted that—for the performance of car icing operations; that at all times mentioned herein Gerald Stintzi was employed by the Addison Miller as a laborer and, at the time of the accident herein alleged, engaged in car icing operations under the direction of the Addison Miller Company.

Again in Paragraph IV, it is recited that on this particular day he was working within the scope and course of his employment and within the line of his duty, along with other employees of said company, in icing cars for the defendant Northern Pacific Railway Company, which cars had been spotted alongside of the defendant's icing dock, and that at that time it was his duty to work and be "on, around and about the said railroad cars," which can only have reference, as I view it, your Honor, to cars that were actually there for the purpose of being iced.

The Court: Mr. McKevitt, I think it is hard for all of us older generation to realize how much the Rules of Civil Procedure have de-emphasized the pleadings and placed the whole emphasis on the proof in trials of lawsuits. The idea is to minimize, or even to almost prevent, a litigant from losing the enforcement of a legal right which he has because a lawyer may have put the wrong [572] alle-

gation in the complaint or pleading, so that if the proof doesn't conform to the pleadings here, the remedy would be for the Court to seriously consider a trial amendment. Assuming now that this proof is beyond the scope of the pleadings, then it would be the duty of the Court, under the Rules of Civil Procedure, to consider a trial amendment, and the only thing that you could do then would be to ask for a continuance on the grounds of surprise, and it seems to me you would hardly be in a position to do that because you took this boy's deposition on the 2nd of April and in that deposition he told you what he was doing and you knew at that time what he was doing at the time of his injury, so that you can hardly say that this is a surprise to you and you weren't prepared to meet it.

Mr. McKevitt: Well, I am not claiming surprise, except that we anticipated that after the deposition of the boy was taken we would be served with an amended complaint wherein they would set forth exactly what they knew, because as I understand it——

The Court: Well, the main purpose of pleadings, under the Rules of Civil Procedure, is to give the other party notice of what is going to be claimed and what is going to be contended, and if there is a variance, then, of course, the rules enjoin the Court to be very liberal in the matter of allowing amendments. So that the point [573] that I am making is that the question that I should be primarily concerned with is, unless there is so much

variance that there should be a stop to it, what does the proof show here.

Mr. McKevitt: Well, of course, our position, among others, your Honor, is there is a total variance between the allegations of both complaints and the statement of issues, even after—I think it was after, I am not sure—the deposition was taken of Gerald. Possibly it was before. Anyway, it was served on us on June 17th, plaintiff's statement of contentions, they didn't deviate at all from the main charge, main allegation, that he was engaged in car icing operations, that is, of the absolute recital in the fourth paragraph that on and prior to July 17, '52, the minor plaintiff was employed by the Addison Miller Company and was engaged as a laborer in the performance of said car icing operations.

The Court: Well, now, I don't know, but I presume probably the plaintiff would take the position that dumping slush ice from the apparatus used to ice the cars would be a part of the icing operations. Oiling machinery, I presume, would be a part of the icing operations, and dumping the slush ice out of the sump pit would be. If it is a variance, then certainly it is such a slight variance that the Court would favorably consider an application for [574] trial amendment to make the pleadings conform to the proof.

Mr. McKevitt: Well, proceeding, then, from the exact legal question your Honor has presented, I think that admitting that to be true for the pur-

pose of this argument, that this boy was still a trespasser.

The Court: Well, that is another point, of course.

Mr. McKevitt: Yes.

The Court: Yes.

Mr. McKevitt: Now they have admitted here at the time of his injury that he was injured while he was on railway property and not on property of Addison Miller as an employee.

The rule is generally stated in 44 American Jurisprudence, Section 431, at Page 652, under the heading "Under or Between Cars:

"Ordinarily, a person who is injured while attempting to pass under or between standing cars in a railroad yard is a trespasser, for whose safety the trainmen owe no duty of care in the absence of knowledge of his presence, and, in the absence of such knowledge, no liability is incurred by the railroad company for his injuries. There is [575] generally no reason for the train crews to anticipate the presence of persons crossing the track between cars of a train. Thus, due care ordinarily does not require trainmen to look under stationary freight cars on a switch before moving them to ascertain whether someone is sitting on the rails. Accordingly, the railroad company is not guilty of negligence where persons are injured while under or between cars without knowledge of the train employees, even though the railroad company knew that persons frequently cross at such points. In any case, it is said that only express consent will serve to

license a thoroughfare across a train. Where, however, the injured person was not a trespasser, as where the cars were standing on a track laid in the public highway, or where the injured person was using a gap between cars customarily placed so that the openings were left for persons to pass through on the way to and from the station, the railroad company may be [576] liable in the absence of due care."

I am just going to call your Honor's attention to two decisions, one from the Supreme Court of this state and the other from the Third Circuit, an opinion by Judge Clark.

The Washington case is that of Christensen vs. Weyerhaeuser Timber Company, 16 Washington (2d), at 424, and there is a rather lengthy recital of the facts. Would your Honor indulge me if I read the decision in its entirety, because I think it deals, at least it is our humble opinion——

The Court: I would rather, if you have it in mind, have you tell me.

Mr. McKevitt: I can give you the syllabus of it, yes:

"An officer of a ship moored to a wharf, who lost his life while endeavoring to make a connection between the ship's electrical extension cable and an electrical fixture located on a pole on the opposite of the wharf, occupied, at the time of his death, the status of licensee as to the owner of the wharf, rather than that of invitee, where it appears that, at the time, the ship was [577] not engaged in loading operations, the pole was nowhere near the path

of ingress and egress between ship and shore, and there was no showing of any mutuality of interest between the wharf owner and the ship owners and their employees in the errand of the deceased at the time of his death, the purpose of making the connection being to furnish electricity to the ship after its generators were shut down, a matter in which the wharf owner had no interest."

And, of course, it can't be contended in this case that we had any interest in the dumping of that ice in the manner in which the evidence shows it to have been performed.

Now going, then, to the portion of the opinion dealing with the law of the question on Page 431:

"The basis of this action is the alleged negligence of the respondent in failing to perform the legal duties devolving upon it. In determining the question of what its duties were, so far as the deceased was concerned, the legal relationship [578] between the parties must be considered."

Citing a case in 3 Washington (2d), Garner vs. Pacific Coast Coal Company.

"The first question presented upon the appeal, then, is whether the evidence was sufficient to warrant a finding that the deceased, at the time and place of his death, was an 'invitee' of the respondent, rather than a mere 'licensee,' as those terms are understood in the law. Unless the deceased was an invitee there can be no recovery in this case, for there is no evidence, nor does appellant contend, that the deceased came to his death through

wanton or willful negligence on the part of the respondent.

It is the rule in this state that the only duty which the owner of premises, or the proprietor of a business conducted thereon, owes to a mere licensee is the duty not to injure such licensee wantonly or willfully."

Citing several cases.

"The rule as thus expressed does not [579] exclude liability on the part of the owner or proprietor for extraordinary concealed perils against which the licensee cannot protect himself, or for unreasonable risks incident to the possessor's activities. Such exceptional circumstances, however, are not involved here.

An invitee is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant of the premises is then engaged, or which he permits to be conducted thereon; and to establish such relationship, there must be some real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates."

Citing a number of cases.

"A licensee is one who goes upon the premises of another, either without any invitation, express or implied, or else for some purpose not connected with the business conducted on the [580] land, but goes, nevertheless, with the permission or at the toleration of the owner. * * *

Assuming that the deceased met his death by

falling or being thrown from the eastern, or inner, edge of the wharf, there is no evidence in this case that his presence at that point came about through any express invitation on the part of the respondent. If any invitation is to be found in the circumstances, it must be one by implication.

The cases hereinbefore cited all hold that the true test for determining whether there has been implied invitation to come upon the premises of an owner or occupant is mutuality of interest in the subject to which the business of the visitor relates. In Gasch vs. Rounds, supra, wherein this court definitely expressed such to be the test, we adopted the so-called Massachusetts rule as expounded in Plummer vs. Dill, 156 Mass 426," et [581] cetera, "in the following quoted paragraph:

'It is well settled there (England) that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must be at least some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant.'

In this connection, it is also the rule that liability upon an implied invitation is limited by the extent of the invitation and does not extend to injuries received on a portion of the owner's premises not covered by the invitation. In 38 Am. Jr. 761, Negligence, it is said:

'An owner or occupant is liable for [582] an injury sustained by a person, who entered the premises by invitation, as a result of a defective condition of the premises only where the part of the premises upon which the injury was sustained was covered by the invitation. If a person, although on the premises by invitation, goes to a place not covered by the invitation, the owner's duty of care owed to such person as an invitee ceases forthwith.' "

They refer also to Corpus Juris and Shearman & Redfield on Negligence.

"In this case the burden was, of course, on the appellant to prove that the respondent was negligent in the performance of some duty owing to the deceased, for the essential elements of actionable negligence are (1) the existence of a duty, (2) a breach thereof, and (3) a resulting injury. Since the respondent could be held liable, if at all, only upon the theory that the deceased was [583] an invitee at the particular time and place of the alleged injury resulting in his death, the burden rested on the appellant to prove that, as to the respondent, the deceased then and there occupied the legal relationship of an invitee. We do not believe that appellant met that burden."

I suppose I should have earlier said that the appeal was from a ruling of the lower court which sustained the defendant's challenge to the sufficiency of the evidence, and this affirmed the lower court so holding.

"It is appellant's theory that the deceased lost

his life some time after five o'clock in the morning, while endeavoring to make a connection, or disconnection, between the ship's electrical extension cable and the Benjamin fixture located on the pole near the inner edge of the wharf. The ship and its crew were not engaged in loading operations at that time, nor was the pole located in the area where the activities of the crew in connection with loading operations were performed. Furthermore, [584] the pole was not on the side of the wharf where ships moored * * *"

Then a further recital of the facts which are condensed in the syllabus portion I read.

"Most important of all is the fact that the evidence fails absolutely to disclose any mutuality of interest between respondent on the one hand and the ship owners and their employees on the other, in the alleged errand of the deceased at the time immediately preceding his death. There is no showing of any agreement or understanding between the respondent and the owners of the ship whereby the respondent obligated itself to furnish electricity to the vessel after it had shut down its generators. There is no showing of any benefit to the respondent in having lights on the ship after loading operations for the day had ceased. It was of no concern to the respondent how the ship, when idle, maintained its lights, whether by its own generators continuing to function as in the daytime, or whether [585] by kerosene lamps after the generators had shut down. In fact, it did not matter to the respondent whether the ship then had lights at all.

The saving of fuel by the vessel in shutting down its engines in no way affected the respondent.

It is true that the ship, through the members of its crew, made use of respondent's facilities by plugging a cable into the Benjamin fitting on the farther side of the wharf, but so far as the record discloses that was at most simply by permission of the respondent. In any event, the practice employed was solely for the benefit of the ship and its crew, and had nothing to do with any operation in which the respondent was concerned. Permission without mutuality of interest, however, simply constitutes a license, not an invitation; nor does long-continued use by permission convert a licensee into an invitee, for, as stated by Judge Pound in Vaughan vs. Transit Development [586] Co., * * * a New York decision, " 'the law does not so penalize good nature or indifference nor does permission ripen into right.' "

And then the Court discusses other decisions of our own Supreme Court and, referring to the case then at bar, says:

"Appellant cites two of our cases defining the duties which the owners of docks and wharves owe to invitees on the premises." * * *

And then they proceed to distinguish those cases factually by saying:

"In both of those cases also is found the element of mutuality of interest, in that the injured person was at the time engaged in an activity in which the owner was directly or indirectly concerned or

from which he received a benefit. The situation here is entirely different, as demonstrated above."

That is the important portion of the opinion I call to your Honor's attention.

Now just one further Federal citation. I might [587] say we could multiply these by any number of additional authorities, but it is an opinion by Judge Clark. It is found in 120 Federal (2d) at 498, Circuit Court of Appeals, Third Circuit, decided May 8, 1941, and this is a short case and I would like to read it to your Honor.

The Court: Of course, our primary concern is with the law of Washington. If the State of Washington has settled the law on this, that is the law I must follow in a diversity case. The other would be persuasive, but not controlling.

Mr. McKevitt: There is some language in it I want to call to your Honor's attention as illustrating the same rule in a different fashion, and your Honor knows, I am sure you have read quite a number of his decisions, he swings language differently than some of the rest of them.

The Court: Well, that's right.

Mr. McKevitt: He says:

"The question of this appeal is both narrow and close. Such closeness is often inherent in the discovery of the line of demarcation between the functions of court and jury. It is particularly prevalent when the substantive rule itself is in some confusion. Law professors at both [588] Oxford and Cambridge have criticized the state of the law on

liability for 'condition and use of land.' The don from Oxford says: 'This chapter shows how closely the English and the American law of torts are related, for instead of establishing a rational system based on the general principle that a possessor of land should be under a duty of reasonable care depending on the facts of each case, the American law has imported from England all the complicated rules concerning business visitors, licensees, trespassers, etc. A French professor, who has been studying the English law of tort, recently wrote that these strict, detailed and often arbitrary rules seemed to him the least happy part of the body of law which, at best, he seemed to regard with more surprise than admiration. Only one thing can be said in favor of the American law: where there is a difference between it and the English [589] law, the advantage seems, as a rule, to be on the side of the American.' * * * Because of the lack of some such simple rule the courts are forced to struggle with evanescent distinctions of law and terminology among licensees, bare licensees, invitees, business guests, and patrons, and to follow the chameleon changes of one into the other. In the case at bar, the transformation is from invitee to licensee. That transformation depends in its turn upon a not always clear subsidiary principle. It has been stated by a leading text writer:

'A person is only an invitee as long as he keeps within the limit of his invitation. The invitation may be limited as to space, time, and method of user of the premises.

The invitee must use the premises in the manner contemplated by the terms, express or implied, of the invitation. If he uses them in a different manner he loses the protection to [590] which he is entitled as an invitee. In the words of Lord Atkin: "This duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use." As Scrutton, L. J. has pointedly said: "When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters.'' ''

"Other writers," Judge Clark said, "speak of 'exceeding the invitation' or of 'uses which are outside the scope and purpose of the invitation,' and in New Jersey the courts employ the expressions 'coextensive with,' 'not within the limits of,' or 'circumscribed by,' the invitation. [591] As we are dealing with entrance upon property, we may expect to and do find a majority of precedents based on spatial considerations. This seems particularly so in New Jersey. The manner and purpose of use are, as we have seen, equally relevant to what the landowner should be required to expect. As the distinctions are all factual, citation of authority is only suggestive. We might mention two cases where the use was held to exceed the invitation as matter of law. In one, a fire escape had been converted into

a clothes' line and in the other a pig iron pile had served as a fulcrum for car loading.

In the case at bar the plaintiff was hurt because of an allegedly unchocked and carelessly braked freight car. He was the job superintendent of a wrecking contractor, Merberg & Sons. His 'master' was engaged in tearing down the buildings of the American Sugar Refining Company in Jersey City. As [592] is known, part of the profit in such operations comes from the salvage. The defendant company furnished steel gondola cars to carry away the metal scrap. The cars were run in on a siding that bisected the sugar refining plant. This was the position of the car whose unexpected movement caused the injury. The track ran and the car was placed between a 90 foot wall being pulled down and a crane doing the pulling. The method (a common one) of demolition was to attach a cable to the top of the wall and then to the loading drum of the crane. The hypotenuse of the triangle crossed the railroad siding at an elevation which brought the 7/8 inch steel cable in contact with one edge of the car. The plaintiff superintendent wished to soften this contact and thus avoid deleterious scraping of the cable. He adopted the simple expedient of placing an old plank (8'x3"x8") between the cable and the car top. While he was so engaged, the car rolled forward [593] and the plank injured his legs. We think these facts bring the case within the 'outside of purpose' or 'excess of limitation' rule as a matter of law. The invitation to the wrecking contractor's employees went no further

than the loading of defendant's freight cars. The method by which the material to be loaded was procured was none of its concern. So the defendant-railroad company was not interested in the particular arrangement of wall, cable and crane. A fortiori it was not interested in the protection of the cable. In acting to preserve it from friction, plaintiff was serving his own employer's purpose and not coming within any use sanctioned by the railroad company. That the source of the friction was the defendant's car was fortuitous. The car could and would be loaded even if the cable was frayed. The learned trial judge was therefore in error in leaving the question of invitation to the jury. [594]

As the decision on this question is dispositive of the case, we shall, without reviewing the other questions * * *"

And we think that that is just expressing the rule in language somewhat different than is employed by our Supreme Court.

Now, briefly, on the contributory negligence of the boy himself, as a matter of law, there is no question from the showing that is made here that he was an unusually bright and intelligent boy and certainly ought to have appreciated that when he attempted to perform this work in the manner that he did perform it, that he was certainly entering into a dangerous area, that the Court would take judicial notice of that fact, and the only excuse for him so doing would be that he was directed to place this ice on the opposite side of the track, but

no instruction, no evidence here, as I recall, that the foreman instructed him to crawl between those cars; and even though the foreman did instruct him to do so, the proximate cause of his injury was the negligence of the Addison Miller foreman, for which the Northern Pacific certainly should not be held responsible.

Mr. Cashatt, do you want to supplement that or not?

Mr. Cashatt: I might add a couple of words, your [595] Honor.

On the first question, your Honor, the invitee situation, I have been unable to find any cases where in a situation such as this, the employee of a third party crawling under the couplers or going between cars, has ever been held to be an invitee. The cases such as at street crossings, customary and usual places, and so on and so forth, there certainly are cases on that particular phase, but on this phase it is our position that the plaintiff in this case did not have express or implied permission to crawl under the cars at the location where he did.

We have numerous other cases, but I believe the cases counsel has cited cover the situation.

The Court: As I remarked last night, it has been the definite announced policy of the Court of Appeals that in a case of doubt, a case of this kind should be submitted to the jury, so that if there is an appeal, the whole record will go up on all of the proof.

Of course, the motion for directed verdict has

a proper place in our procedures, and where I am convinced that the plaintiff hasn't made a case to go to the jury, I wouldn't hesitate to grant motions for direct verdict. I have granted them, but I grant them sparingly, and if there is any doubt about it, if there is any doubt in my mind, of course the common sense thing to do is to let the trial [596] go on, because I haven't time to sit down and, as Snuffy Smith would say, riddle out these rules in cases at this stage of the lawsuit. And under our rules, the motion for directed verdict, converted in to a motion N.O.V. if the verdict is for the plaintiff, may be renewed at any time within ten days after the trial.

I think that this is, to use Judge Clark's language a very narrow and close case so far as the railroad company is concerned. You have to bear in mind all the time that this suit is not against Addison Miller, but against the railroad company, and it is the burden of the plaintiff to show that the railroad company owed some duty to this minor which was breached by negligent conduct.

However, it seems to me that there is a distinction here, and my only problem at this time is to determine whether or not in this evidence presented by the plaintiff there is any substantial proof or inference that may reasonably be drawn from it that would sustain recovery, for it is for the jury to weigh the evidence and determine the credibility of the witnesses and to draw the inferences, so long as they are permissibly reasonable ones.

Now here, it seems to me, that even from the

proof without the contract in evidence, we have a situation where there is an arrangement of some sort, a business arrangement, between the railroad company and this Addison [597] Miller Company. To do what? To do work that is very vital and essentially necessary to the conduct of the railroad's business. The railroad company, obviously, has a very direct and vital interest in the icing of its refrigerator cars, because freight and perishables could not be shipped without icing them.

Now, rather than doing that on their own premises themselves, they have turned that task over to someone else, and assuming, as I think I should here, that the Addison Miller Company is not an agent of the railroad company, but an independent contractor, there is a very definite mutuality of interest in the conduct of this icing operation, and I think that covers not only the matter of putting the ice and the salt into the compartments of the "reefers," but also anything that is reasonably necessary to the conduct of that operation. And I think that the dumping of the slush ice from the pit and the disposal of the salt sacks from the salt cars, the unloading of the salt from the salt cars and putting it into the salt pit, are just as much a part of the operation as the actual putting of the ice and salt into the compartments of the cars.

And what we have here is proof that customarily this space north of Track 13 was used by Addison Miller for dumping salt sacks; that when they put salt into the pit, they dumped the sacks over here in this space that was [598] commonly used by

the railroad company, also, for the disposal of refuse, and that there the sacks were dumped and that would necessitate crossing that track in some manner or other.

So that I think the jury would have a right to infer that when the foreman directed the minor, as they could believe, to dump this slush ice across the track, that he was directed to dump it in the place where the salt sacks were customarily placed and where the railroad company knew or certainly should have known that that part of the premises was used for the icing operation, and it seems to me that we have here a situation where there could be a reasonable inference that the railroad company at least permitted the use of this area beyond Track 13 and the crossing of Track 13 for the purpose of disposal of refuse by the Addison Miller Company. And then if the minor went upon it in the exercise of that permissive use, he would be an invitee and not a mere licensee.

And, also, it seems to me that the matter of contributory negligence, under the circumstances here, is one for the jury, because you would have a different question, certainly, I think, if of his own volition he elected to go under the couplings of standing cars to dispose of this slush ice; but we must remember that the testimony here is that never when cars were standing on that track, [599] according to the testimony of some of the witnesses, never were floating cars jammed into them in the manner that was done here on the 17th of July, so that these people who were working there, accord-

ing to their version of it, had good reason to believe that they were safe; that those cars were frozen even without a blue light; that there would be no violent switching operation while those cars were standing there and while salt was being unloaded from one of them. So that when this boy comes out and sees the platform there with salt being moved from one of the boxcars, isn't it an inference that the jury could draw that he had reason to believe that he could safely go under the car, as he had been ordered to do? And we should scarcely expect a 17 year old boy to quarrel or question a mature foreman and say, "No, you are wrong, I am going to do this in a different way. I am not going to do it the way you seem to have ordered me to because I have either got to go through or take an impractical course around the end of a long car or under a platform where salt is being unloaded."

At any rate, I think at this stage the case should go on, and the motion will be denied.

Bring in the jury, then.

(Whereupon, the following proceedings were had in the presence of the jury:) [600]

The Court: All right, proceed.

Mr. Cashatt: May I proceed, your Honor?

The Court: Yes.

Mr. Cashatt: Mr. Thomsen, will you please come forward and be sworn?

A. C. THOMSEN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Will you state your name, please? A. A. C. Thomsen.

Q. And what is your occupation?

A. District Claim Agent.

Q. For what company?

A. The Northern Pacific Railway Company.

Q. Where do you live? A. At Spokane.

Q. And is your office in Spokane, also?

A. At 805 Old National Bank Building.

Q. How long, Mr. Thomsen, have you had this position of District Claim man for the Northern Pacific Railway? A. 14 years.

Q. How long have you been in Spokane? [601]

A. About 9 years.

Q. Mr. Thomsen, on June 9, 1954, at about 4 p.m., did you talk with Ray "Idaho" Davis on the front porch of his home at East 3511 Garnet Street, Spokane, Washington?

A. Yes, I did.

Q. At that time, Mr. Thomsen, did Mr. Davis state to you: "I was in the salt mine?"

A. Yes, he did.

Q. Did you ask him what he meant by "salt mine?" A. I did.

Q. And what did he say?

A. He said that is the salt pit where the salt is stored.

(Testimony of A. C. Thomsen.)

Q. At that time, did you ask him if he, on the night of this accident, July 17, 1952, right at the time just before the accident happened, was unloading salt from a boxcar?

A. I asked that question, yes, sir.

Q. What did he say? A. He said "no."

Q. At that time, did you ask him if there was any car of salt on the track by the salt house for unloading? A. He said he knew of none.

Mr. Cashatt: You may inquire. [602]

Cross Examination

Q. (By Mr. Etter): You have been the Claim Agent for 14 years, you say, Mr. Thomsen?

A. For the Northern Pacific, yes, sir.

Q. That is here in this area?

A. Nine years here and the balance in Butte, Montana.

Q. The balance in Butte, Montana?

A. Yes, sir.

Q. So I assume that your district, you have been here 9 years as District Claim Agent?

A. Yes, at Spokane.

Q. That is correct. You, in that period of time, have taken a lot of statements from witnesses for the purpose of investigating railroad accidents?

A. Yes, I have.

Q. Is that correct, sir? A. Yes.

Q. As a matter of fact, in this particular case you secured numerous statements immediately after the accident and subsequent thereto from witnesses

(Testimony of A. C. Thomsen.)

who were there or who purported to know something in connection with the accident?

A. Yes, I delivered those over to you.

Q. Those were delivered to us, isn't that correct? [603]

A. I think there are about 14, Mr. Etter.

Q. You took about 14 statements. All of these were written statements, were they not?

A. That's right, typewritten.

Q. Did you talk to Idaho Davis prior to June the 10th of 1954?

A. I talked to him on the phone on June the 3rd, 1954.

Q. June 3rd? A. Yes, sir.

Q. Do you recall what that conversation was about?

A. Yes, I called him and asked him if I could come out to see him, and he gave me the address that he was at. And then he volunteered to come down to see me the following day at 10 o'clock, which would have been the 4th of June.

Q. I see. He didn't come down?

A. No, he didn't show that day.

Q. And then you went out to see him on the 10th? A. The 9th.

Q. The 9th? A. Yes.

Q. After calling him? A. Yes.

Q. You called him first and went out to talk with him?

A. No, not on the 9th; I just went out and talked to him. [604]

(Testimony of A. C. Thomsen.)

Q. He said he had been working in the salt mine? A. Yes.

Q. What was the full extent of your conversation, as you remember it?

A. When I arrived, he came to the front door and stood in the door as we talked. I stood on the porch, and he immediately asked me, he said, "Are you the man who called me on the phone?" and I told him that I was. Then he went on to explain that he had come to my office on Saturday, the 5th of June, and that the office was closed, and I told him that that would be true on a Saturday.

Q. Well, now, back on August the 7th of 1952, right shortly after this accident happened, you knew, as a matter of fact, that one of the witnesses had stated that the path between the cars and the icing dock couldn't be taken for the purpose of dumping the slush because of the platform that was observed there between the salt mine, so-called, and the salt cars, didn't you?

A. That was in the second statement I took from Allan Maine, I believe.

Q. That is correct, but it was taken on the 7th day of August of 1952?

A. At his home, yes, sir.

Q. At his home. And he told you that the path was more or [605] less blocked by a low, removable platform from the dock to the salt car, or rather between the salt car and the salt house located on the dock; isn't that correct?

A. That is correct.

(Testimony of A. C. Thomsen.)

Q. So you knew back in 1952, on August the 7th of 1952, about the possibility, at least, from the statement of this witness of the salt loading and unloading operations, is that correct?

A. I knew that Allan Maine had said that in his statement, yes, sir.

Q. He had said that in his statement. Well, at that time did you go out and make any inquiry of Idaho Davis?

A. No, I was unable to find Idaho Davis, and I dropped the search.

Q. You were unable to find him?

A. I made one or more attempts to reach him.

Q. I see. And you dropped the search from August the 7th, somewhere about there, 1952, until June the 1st of 1954? A. That's right.

Q. Was he hard to find this time, Mr. Thomsen?

A. Well, he was. I didn't know where he lived and I tried a number of telephone calls, and finally on the 3rd a man came to the phone at a Hudson number, I forget the number, and called him to the phone. That was [606] the first contact I had with him.

Q. Well, you knew at the time the man that you were looking for, you knew you were looking for Ray Idaho Davis, isn't that correct?

A. Yes, I knew him as Idaho Davis.

Q. You knew him as Idaho?

A. Yes, Allan Maine had given me his name.

Q. Allan Maine had told you? A. Yes.

(Testimony of A. C. Thomsen.)

Q. You knew he was a football player at Rogers High School?

A. I think he told me that they were friends, yes.

Q. And that he went to Rogers High School?

A. I believe he said he was an athlete, yes, sir.

Q. And he was in Rogers High School in 1952, isn't that right?

A. Well, I didn't know that.

Q. Well, did you ever go out to Rogers High School? A. No, I didn't.

Q. To talk with him? A. Never did.

Q. You made no further inquiry then about him, is that right?

A. That's right, until in June of this year.

Q. Well, did you ever notice in the newspapers during the [607] fall of 1952 or '53 anything about Idaho Davis being an all-city halfback or playing on the football team?

A. I'm afraid I didn't, I don't follow the local football scene very closely.

Q. So you didn't know anything about him except he was Idaho Davis, you weren't able to find him? A. That's right.

Q. And over a period of two years, the first time that you have been able to make this contact is this last time in the fore part of June of this year?

A. Talked with him on the phone on the 3rd of June.

Q. On the 3rd? A. Yes.

Q. And, as I say, though, you knew about this

(Testimony of A. C. Thomsen.)

statement and had this information on August 7, 1952? A. That's right.

Q. Isn't that correct?

A. That is correct.

Q. All right. Now, Mr. Thomsen, you went out and talked with him, but you secured, as you have indicated to this jury, about 14 written statements, which you secured from practically every available witness, I assume, that you could find in the pursuit of your duties for your company; isn't that correct? A. I beg your pardon? [608]

Q. You took statements from everybody that you could find that knew anything about this case?

A. That's right.

Q. About 14 of them in all, isn't that correct?

A. That's right.

Q. Why was it that you didn't get a written statement from Idaho Davis?

A. Well, I was just probably a little negligent in not getting it. Allan Maine had told me that he was not an eye witness, I knew that much.

Q. Well, is that your explanation to the jury why you are here testifying as to an oral conversation without a statement, that you were negligent?

A. I may have been.

Q. You have been the District Claim Agent, as you say, for 9 years and 5 years you have been in Montana, and you go out and investigate this case and it was one of the most serious injuries you have ever handled, isn't it, Mr. Thomsen?

(Testimony of A. C. Thomsen.)

Mr. Cashatt: I object to that question, your Honor.

The Court: I will sustain the objection to that.

Q. (By Mr. Etter): I will ask you whether or not you didn't——

The Court: You can ask him if it was an important case. [609]

Q. (By Mr. Etter): I will ask you whether or not this is an important case?

A. I would regard it such, yes.

Q. Why?

A. Because of the severity of the injuries.

Q. And you say you got these statements, but you didn't get a written statement from Idaho Davis?

A. That's right. I didn't follow it up.

Q. Didn't follow it up. And you are testifying here as to your recollection of an oral conversation that you had with him? A. That's right.

Q. Are you prepared to say as an absolute certainty that Idaho Davis told you he did not and was not and had not unloaded salt?

A. I surely am.

Q. Beg your pardon?

A. That is what he said.

Q. That is what he said? A. Yes, sir.

Q. And that was on June the 9th?

A. June the 9th.

Q. Now I have asked you whether you got a statement; did you ask him for a written statement? A. No, I didn't. [610]

(Testimony of A. C. Thomsen.)

Q. You did not?

A. I didn't go out there with that intention.

Q. Didn't you ask him then to provide you with one, or did you state to him that you would come back and have him sign one?

A. No, I didn't even have my typewriter with me, Mr. Etter.

Q. Didn't have your typewriter? A. No.

Q. You stated that this was a serious case because of the severity of the injuries, isn't that correct? A. That's right.

Q. You were likewise in your investigation, or were you, attempting to determine the responsibility?

A. No, I was just to get the facts. Those are my duties, Mr. Etter, just to get the facts.

Q. For your employer?

A. For my employers in St. Paul, Minnesota.

Q. And the facts that you were trying to get, of course, you were interested in determining how the accident happened?

A. That was the sole purpose of my inquiry.

Q. That was the sole purpose? A. Yes.

Q. The sole purpose of inquiring into those facts would be [611] to determine whether there was any liability of the railroad company or of the party who was injured or of anybody else, isn't that right?

A. Well, I don't determine liability questions.

Q. Yes, you don't determine them, but I mean you try to get the facts from which it can be determined?

(Testimony of A. C. Thomsen.)

A. Yes, I try to get the facts from the various witnesses, yes, sir.

Q. Beg your pardon?

A. I try to get the facts from the various witnesses.

Q. And at the time in 1952, did you feel that it was important to get the facts with regard to whether or not there was a salt unloading operation being carried on?

A. No, I didn't attach much importance to that, I just figured that this young man was so young that he probably was confused about that.

Q. In other words, you didn't attach any importance to it?

A. Not from that particular witness, no.

Q. From Mr. Maine, you mean?

A. Yes, from Mr. Maine.

Q. And you didn't attach any importance to it until June of this year, is that it?

A. Not until after Mr. Stintzi's deposition had been taken when he raised that question.

Q. When he raised the question? [612]

A. Yes.

Q. You don't think, or do you think that Mr. Maine had raised it at the time in his statement?

A. I beg pardon?

Q. Did you feel that Mr. Maine had raised a problem or a question of responsibility of liability?

A. No, I thought due to his extreme youth, that he probably was confused about the operation down there.

(Testimony of A. C. Thomsen.)

Q. And then you felt that Mr. Stintzi was also confused about it?

A. Well, at that time I had made further checkup and had determined that there was no salt car there.

Q. You what?

A. I had determined from the company's record that there was no salt car there that day.

Q. When did they tell you that?

A. Well, I checked it from the records.

Q. When, though? A. In '52.

Q. In '52? A. Yes.

Q. And then on April the 2nd when Mr. Stintzi's deposition was taken, there was a further statement by Mr. Stintzi about the salt operation, is that right? A. Yes, yes. [613]

Q. I mean April of '54?

A. Yes, he elaborated on it then.

Q. And two months later was the first time that you made any inquiry for Idaho Davis?

A. Well, that was occasioned by the fact, Mr. Etter, that the case had been set for trial.

Q. I see.

A. I had been notified by Mr. McKevitt and Mr. Cashatt that the case was set for trial. That was done during my absence, I was in California at the time.

Q. Well, now, did you feel that it was important to talk with Idaho Davis on June the 1st, if you had made an inspection of the railroad cars and had come to the conclusion in '52 that the state-

(Testimony of A. C. Thomsen.)

ment of Allan Maine was made by a confused youngster? Was there any point, did you feel, in talking to Idaho Davis?

A. Yes, I had two purposes in talking to him.

Q. What were they, both of them?

A. One was to check on his availability for the trial. I was doing that as a routine matter.

Q. All right?

A. And, second, I wanted to find out where he was when the accident occurred.

Q. His availability for trial, was that for the defendant, is that it? [614]

A. Well, in case they should have needed him. They didn't.

Q. Was there any subpoena issued for him at that time?

A. I believe there has been none issued.

Q. I see. But you knew, and I guess you have indicated that you had checked this question out in 1952? A. Yes, sir.

Q. And did not become concerned with it until April of 1954?

A. Well, I became concerned about it when the case was set for trial, yes.

Q. I thought you said a minute ago it was Mr. Stintzi's deposition is when you became concerned with it.

A. Well, I had it in mind, yes.

Q. You had it in mind in April? A. Yes.

Q. And you went out and talked to this boy two months later? A. Yes.

(Testimony of A. C. Thomsen.)

Q. But did not get a statement?

A. No written statement, no, sir.

Q. Nor did you ask for one?

A. I didn't ask for one, no, sir.

Mr. Etter: That is all.

The Court: Any other questions? [615]

Mr. Cashatt: That is all, Mr. Thomsen.

The Court: That is all, then.

(Witness excused.)

Mr. Cashatt: Mr. Corrigan.

FRANCIS T. CORRIGAN

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name, sir, is Frank Corrigan, is it? A. Yes, sir.

Q. And where do you reside?

A. 6300 East First in the Valley.

Q. How long, Mr. Corrigan, have you lived in Spokane? A. 34 years.

Q. And married and have a family?

A. Yes. I have a married daughter in California.

Mr. McKevitt: Keep your voice up, Frank, please.

Q. (By Mr. Cashatt): What is your occupation?

A. I am the general yardmaster for the Spokane-Yardley yard for the Northern Pacific.

Q. General yardmaster?

(Testimony of Francis T. Corrigan.)

A. General yardmaster, yes. [616]

Q. What is a general yardmaster?

A. Well, the general direction of the movement of all cars and trains are under my supervision while they are inside of the yard limit borders, which extends from Seventh Avenue to about Argonne Road east of Spokane.

Q. How long have you held this position as general yardmaster? A. A little over 3 years.

Q. How long have you been employed by the Northern Pacific Railroad?

A. 34 years here and some previous time on the Coast.

Q. When you say "here," you mean in Spokane, is that right? A. Yes.

Q. Just tell us what other jobs and positions you have had.

A. Well, I first came here and was employed as a switchman from May, 1920 until May, 1936. I was then promoted to yardmaster. I served as a yardmaster for 5 years. I was then made assistant general yardmaster, I served for about 10 years, and I was then promoted to general yardmaster, which I have held for a little over the last 3 years.

Q. Now what hours, Mr. Corrigan, do you work?

A. Well, I am what you call a 24-hour man, I am subject to [617] call at any time. But my office hours are ordinarily from about 8 a.m. to around about 5 p.m.

Q. And where is your office?

A. Out at the Yardley yard.

(Testimony of Francis T. Corrigan.)

The Clerk: I have marked Defendant's Exhibit 37.

The Court: Is it 37?

The Clerk: 37.

The Court: It hasn't been admitted yet.

Mr. Cashatt: I was just going to ask counsel.

The Court: Well, all right.

Mr. MacGillivray: We have no objection.

Mr. Cashatt: I am offering Exhibit 37.

The Court: It will be admitted in evidence, then. Go ahead.

Is that 37, did you say?

The Clerk: Yes, your Honor.

The Court: All right.

(Whereupon, an aerial photograph was admitted in evidence as Defendant's Exhibit No. 37.)

Q. (By Mr. Cashatt): Mr. Corrigan, would you please step down here, sir? [618]

(Witness goes to blackboard.)

Mr. Corrigan, Exhibit No. 37 has been admitted in evidence and it is an aerial photograph of the Yardley yards of the Northern Pacific Railway. Will you look at it, Mr. Corrigan, and see if you can orient yourself as to what is shown as to the directions? Would this be north (indicating)?

A. Yes.

Q. And south? A. South.

Q. And west? A. West.

Q. And east? A. That's right.

(Testimony of Francis T. Corrigan.)

Q. And do you recognize on Exhibit 37 where your office would be?

A. Let me see, right about in here (indicating).

Mr. McKevitt: Designate by a reference.

Q. (By Mr. Cashatt): You are pointing now, Mr. Corrigan—— A. To the yard office.

Q. To the yard office, which is located on—oh, it would be toward the southwest corner of the map, in that general area? A. That's right.

Mr. McKevitt: Mr. MacGillivray makes a good [619] suggestion, Leo, that you put East, West, North and South on there, will you?

Mr. Cashatt: Yes.

Mr. MacGillivray: Take a pen and just put the directions on there.

(Directions placed on Exhibit 37 by Mr. Cashatt.)

Mr. MacGillivray: I might make the same suggestion, your Honor, on all of these exhibits, that during the recess we put the directions on them.

Mr. McKevitt: That is agreeable.

The Court: Do that some other time.

Mr. MacGillivray: During the recess.

The Court: Not interrupt. May we not assume, unless the contrary is shown, that on all of the maps and diagrams, up is north, left is west, and so on? I used to do a little surveying when I was in high school so I know a little bit about that.

Mr. McKevitt: I know if I face to the north, then that the west is on my left.

The Court: Go ahead.

(Testimony of Francis T. Corrigan.)

Q. (By Mr. Cashatt): Mr. Corrigan, between what area, streets, does your yard run? Tell us about the street, what would be the west end of your yard.

Mr. McKevitt: Stand so his Honor and all the jurors can see you. [620]

A. Havana Street would be on the west end; what we call Hardesty Road cuts across about one-eighth of a mile from the east end, from the extreme east end of the yard. Now this is not the yard limits, this is the actual yard I am speaking about.

Q. (By Mr. Cashatt): The actual yard?

A. Yes.

Q. And in length, Mr. Corrigan, from say Havana, which you mentioned, on this end to the designation you have given us on the east, do you know approximately how far that is in between?

A. A little bit over a mile, just a little over a mile.

Q. And on Exhibit 37, Mr. Corrigan, can you point out how many tracks, tell us how many tracks you have, and take the pointer and generally show where they are? A. Well, we start——

Q. Stand back so the jury can see.

A. We start right here (indicating)——

Q. That is on the south side?

A. Which is the east—first, I will go back. This is the cannery spur (indicating), this is the extreme south track in that yard, and it is an industrial spur. Then we have the eastbound main, then the westbound main, and then we start in number-

(Testimony of Francis T. Corrigan.)

ing our tracks from Track No. 1 and go north. We have 13 trainyard tracks, [621] extending from No. 1 to 13, inclusive. Then we have 4 cleaning tracks, extending from 14 to 18, inclusive, with a short track located just north of Track 14 that only holds about 11 cars. That is known as Track 15. Clean stockcars and sand them and disinfect them, and so on and so forth. We have no Track 19; Track 20, 21, 22, 23, 24 and 25 (indicating) are what we call the repair tracks. 27 and 28 are shop tracks. Then we get over into Track 29, 30, and so on, on up to and including Track 41, and those are used mostly for company business, the engines go in and out of the round house. We have a track where we spot coal to put up on the coal dock and another track where the empties come down. Back of the round house we have what we call the machine shop tracks. Then clear over to Track 41, which is the last track in this particular yard, is the track where we put up coal for the stationary boiler.

Q. And Track 43, do you know where that is?

A. Track 43 starts over here (indicating). Now this is what we call the "pocket yard," and it extends from Track 42 over to and including Track 55.

Q. Now point out the round house, will you, Mr. Corrigan, if you can recognize it there?

A. This is the round house right down around here. You can see the turn-table pit in the center.

Q. From this I know the tracks aren't distinct,

(Testimony of Francis T. Corrigan.)

and so on, but can you designate Track 13, if you can identify it from that picture? Take a look.

A. Well, I would say this is just about Track 13 right along here (indicating). Yes, that is just about 13 right in there.

Q. On the picture, Mr. Corrigan, I don't believe the detail is enough to identify the ice dock, is that right?

A. Well, no, it doesn't. That dark line along here possibly is the shed on top of the ice dock, for it just extends for a short distance in the middle of the dock, but I can't see the ice dock on there.

Q. In looking at Exhibit 37, Mr. Corrigan, the things we see sitting along here, the little lines with spaces in between, can you tell what those are?

A. Well, they are supposed to be cars, I guess.

Q. How many cars, Mr. Corrigan, go through and in and out of that yard in an average month?

A. Well, normally we handle about 55 to 56,000 cars a month in and out. By in and out, I mean we get credit for them twice—once coming in, once going out—which makes about 56, 57,000. It all depends on how business is.

Q. And can you tell us, Mr. Corrigan, what would be the [623] average number of times that a car would be switched while it is in the yard?

A. Well, actually, some of these cars are handled as high as 6, 7, up to 8 times, between the time they arrive and the time they depart from the yard. Then others move right through with two handlings.

(Testimony of Francis T. Corrigan.)

Q. Mr. Corrigan, what about the switching operation on an average day, how many switch engines are at work in the yard?

A. Oh, our normal operation is 21 engines, which is 3 engines on each shift, around the clock.

Q. So on each shift there would be an average of 3 switch engines working, would there?

A. 7 switch engines.

Q. 7 switch engines?

A. 7 switch engines.

Q. Excuse me, you said 3 shifts. A. Yes.

Q. That was my fault. Now the crews on those switch engines consist of what?

A. There is a foreman, two helpers, an engineer and a fireman.

Q. And from whom do they take their orders?

A. From the assistant general yardmaster or from the assistant yardmaster under the assistant general [624] yardmaster, but the direct operation of the yard on that particular shift is governed by the assistant general yardmaster.

Q. Now your position is the general yardmaster?

A. That's right.

Q. Then on each shift do you have an assistant yardmaster?

A. I have an assistant general yardmaster under me on each shift. One goes to work at 7 in the morning and works until 3; another relieves him at 3 and works until 11; another man relieves him at 11 and works until 7 in the morning.

(Testimony of Francis T. Corrigan.)

Q. I believe you can be seated now, Mr. Corrigan.

Tell us now, Mr. Corrigan, just what the duties are of an assistant yardmaster.

A. Assistant general or the assistant?

Q. The assistant general.

A. The assistant general. Well, he is held responsible to me for the correct movement of all cars through the yard while he is on shift, for the spotting of the cars at the different industries, pulling cars from the different industries, putting bad order cars onto the repair tracks, the spotting of cars any place that it is necessary to put them in order to have any kind of service performed on them. He is directly responsible for that on his particular shift. [625]

Q. Say a yardmaster coming on shift at, say, 3 o'clock in the afternoon, is he given any information as to what cars are in the yard at that time?

A. Yes. We have a number of checkers, what we call yard clerks, that check every car in the respective yard and bring in these checks, these car numbers, on long lists and lay them down on the yardmaster's desk. The yardmaster going off shift, the assistant general yardmaster going off shift, makes out what is known as a turnover.

Mr. McKevitt: A what?

A. A turnover. That is made in a turnover book and it gives the yardmaster coming on duty a general idea of what is on each separate track in the yard. Then by picking up the lists that the clerks

(Testimony of Francis T. Corrigan.)

have brought in, he has a pretty good idea of the over-all picture of the yard as he goes to work at his respective time to go to work.

Q. Is that for the purpose, Mr. Corrigan, so that he will know and have the information where the cars are and on what tracks they are, and so on?

A. Oh, yes.

Q. And was such a record kept during the month of July, 1952? A. Oh, yes. [626]

Q. And is that a regular running record of the Northern Pacific Railway? A. Yes.

Q. Now, Mr. Corrigan, in the yard out there in switching, is it the custom to disengage cars from an engine and let them drift down a track? Is that done out there?

A. Oh, yes, that is the practice of switching. That is the conduct of switching, yes.

Q. And is that done in the day or evening?

A. Oh, yes.

Q. Is it done on each shift throughout the 24 hours? A. Yes.

Q. And when you are in the yard, do you hear any noise? A. Oh, yes.

Q. Tell us what general noise you hear around that yard from time to time?

A. Well, naturally, in switching cars, we'll say that there is a cut of cars in on a track and the engine working on the lead cuts off, oh, maybe 1, 2, 3, 4 cars and let them roll in and bump against cars that are already in on the track, and, naturally, you can imagine steel going against steel, when the

(Testimony of Francis T. Corrigan.)

draw bars hit against each other, it makes quite a bit of noise. Then when trains are pulling in and out of the yard, if the train happens to have a steam engine on it, the [627] exhaust from the steam engines, they make considerable noise, and so on and so forth.

The Court: I think we should take a recess now. The Court has been in session since 9:30.

I think I should explain to you members of the jury that when I excused you last night until 9:30, I knew that we would have some argument on law questions. I had hoped that we would get through with it last night, but that proved to be impossible, so that nobody was late in keeping you waiting this morning; we were just working out here while you were waiting in there. It was unavoidable.

Court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

Q. (By Mr. Cashatt): Mr. Corrigan, the practice of uncoupling cars and freight cars in the switch yards and letting them drift down the track, is that a common practice in railroad yards throughout the country?

A. Oh, yes, that is the standard practice for switching.

Q. And have you worked for other railroads?

A. I have been around quite a bit.

Q. Which ones?

A. Well, this is the fourth time I have worked for the Northern Pacific; worked twice for the Great Northern; worked for the Union Pacific,

(Testimony of Francis T. Corrigan.)

Southern Pacific, [628] Santa Fe, Rock Island; worked for King Street Terminal over in Seattle and worked for a couple of construction outfits.

Q. And was that a common practice, this uncoupling of cars and letting them drift down the tracks in a switch yard with those roads that you worked with?

Mr. MacGillivray: Just a moment. Objected to as immaterial. We know in this case what the Northern Pacific did and that is all that is material.

The Court: It is material only to show the common custom and practice. It will be permitted for that purpose.

The Witness: I may answer?

The Court: Yes.

A. Oh, yes, that is the standard practice of switching cars. In that line, I would say in yards where they have a little hill, they even furnish the fourth man on a crew with a club to ride cars so they can let them keep rolling.

Q. Now, Mr. Corrigan, you are familiar with where the Addison Miller people operated the ice dock in the yards? A. Yes.

Q. And is there a phone between the yard office and the Addison Miller dock?

A. Yes, company phone. [629]

Q. Company phone? A. Yes.

Q. That is a regular Bell telephone?

A. Yes.

Q. Was there in July, 1952?

A. Oh, yes.

(Testimony of Francis T. Corrigan.)

Q. And were you familiar, Mr. Corrigan, in July, 1952 with the procedure in Northern Pacific contacting Addison Miller and Addison Miller contacting Northern Pacific in regard to the work that was to be done by them? Were you familiar with that procedure? A. Yes, I was.

Q. Will you tell us, Mr. Corrigan, what the procedure was in July, 1952 when cars would arrive at the yards to be iced?

A. Well, of all trains coming into the yard, we have what we call a wired list which is taken by the operator on duty at Yardley. The trains coming from Pasco, the conductor on the train leaving Pasco gets a check of his train and makes a copy of it on a soft list, what we call a soft list, and drops it off to the operator at Connell. The operator at Connell wires it to the operator at Yardley; that is, the telegraph operator. The telegraph operator at Yardley makes three copies of this list. He gives one to the assistant general [630] yardmaster on duty, he gives one to the ice foreman on duty, and he hangs one up on a hook for the special agent on duty. And on this list the conductor shows the number, the initial, the number of the car, the gross weight of the car and contents, the contents, and the final destination of the car. Also, if there are any refrigerator cars, he makes a notation on the side of the list showing what kind of service those cars require.

Q. You mentioned ice foreman, what about that?

(Testimony of Francis T. Corrigan.)

A. We have on duty out at Yardley an ice foreman that has charge and has the responsibility for seeing that all perishable shipments going through the yard, and also I will say laying around the yard spotted at different places, are kept in such a condition that they will not spoil. Now the general foreman works from 8 a.m. until 4 p.m.; he has an assistant foreman that relieves him at 4 and works until 12 midnight; and there is another assistant foreman works from 12 midnight until 8 a.m. in the morning. So when I speak of ice foreman, that is who I refer to.

Q. And those are the Northern Pacific employees, are they? A. Yes.

Q. And then when the information you have told us about, a train coming in with refrigerator cars, when that [631] arrives or before it arrives, what does the ice foreman do?

A. The ice foreman will check this list over, decide what kind of service these cars require. He then goes to the yardmaster on duty and asks the yardmaster how he is going to handle this train, whether he is going to head it in a trainyard track or pick it up and set it over, set the icers over to the dock, or whether he is going to head this train right in at the dock and let them start icing. He then calls up Addison Miller and tells Addison Miller how many perishable loads he has coming in on this train, what the service requirements are, and how the yardmaster is going to handle it.

(Testimony of Francis T. Corrigan.)

Q. And is that done before the train actually arrives? A. Oh, yes, yes.

Q. And then is it the assistant yardmaster on duty, is he the one that gives the direction to put the train on either Track 12 or Track 13?

A. Oh, yes, yes, he is the boss in the yard. He is the bossman.

Q. Then after the icing, do you know, Mr. Corrigan, how it is handled after the icing operation is completed?

A. Well, as soon as the icing operations are completed, the ice foreman ordinarily has an assistant down on the dock to measure the amount of ice and salt that is used [632] to service each one of these cars. There also is a representative from Addison Miller up on the dock, and when they have agreed that they are all through servicing these cars, then they notify the ice foreman, the ice foreman notifies the yardmaster that they are all through with the cars, and the yardmaster handles them from then on.

Q. Mr. Corrigan, what is the procedure as to handling salt cars that come in? A. Well——

Q. In 1952, July, 1952, what procedure did you follow?

A. We have a salt house underneath the west end of the icing platform. The salt comes in in boxcars and, at the convenience of the yardmaster, this boxcar loaded with salt is spotted opposite the door to the salt house, and the Addison Miller Company

(Testimony of Francis T. Corrigan.)

then has the responsibility for unloading this salt out of the car into the salt house.

Q. Is the assistant yardmaster the one that gives the order to spot that car?

A. The assistant general yardmaster, yes.

Q. And then when unloading of the salt is completed, what is the procedure to remove the car?

A. When the car has been unloaded, they notify the ice foreman, the ice foreman notifies the yardmaster that [633] the salt is all unloaded, and the yardmaster removes the car at his convenience.

Q. Do you know, Mr. Corrigan, if there is a regular permanent record kept by the Northern Pacific Railroad of the salt cars when they come in the yards and when they are unloaded, and so on? A. Oh, yes.

Q. And that is a regular Northern Pacific running record, is that right?

A. Oh, yes, yes.

Q. And is there also a record kept by the Northern Pacific of refrigerator cars or refrigerator trains, fruit trains, that come into the yards and are iced? A. Oh, yes.

Q. Does that record show the time of arrival and the time of the completion of the icing operation, and so on? A. Yes, it does.

Q. And the time of departure?

A. Yes, it does.

Q. And is that record a regular permanent running record of the Northern Pacific Railway Company? A. Oh, yes.

(Testimony of Francis T. Corrigan.)

Q. And where are those records kept?

A. We have a copy of them out at Yardley. Oh, they are kept for years back. [634]

Q. But your copy is kept at Yardley, Washington?

A. Yes. Well, there is some copies kept at Yardley and there is some copies are sent down to the freight house and they are kept by the agent's office down at the freight house.

Q. And those records that we have talked about, Mr. Corrigan, are they made up under the supervision of the chief clerk at Yardley, Washington?

A. Well, now, you mean the icing?

Q. Yes?

A. No, I would say that they are made up under the ice foreman, under the supervision of the ice foreman.

Q. But all of the records made at Yardley concerning the movement of cars at that location, are they made under the supervision of the chief clerk?

A. Oh, yes, of the movement of the cars, yes.

Q. Mr. Corrigan, I don't believe you were at Yardley, Washington on July 17, 1952?

A. No, I wasn't.

Q. In the evening?

A. No, I wasn't, no.

Q. You had been there during the day, had you, sir?

A. No, no, I happened to be on my vacation at that time.

Q. I see. And, Mr. Corrigan, what was the prac-

(Testimony of Francis T. Corrigan.)

tice in July, 1952 up to July 17, 1952, as far as the use of blue lights by Addison Miller Company?

A. Well, at the time cars are spotted down at the ice dock, when Addison Miller's crew gets ready to work on those cars, they turn on what are known as blue lights at both ends of the dock.

Q. When you say both ends, that is the west end and the east end, is that right? A. Yes, yes.

Q. What kind of lights, Mr. Corrigan, are those?

A. At that time, there were electric lanterns—electric lights, I should say—with blue lenses or blue globes in them at each end of the dock on Track 12 and also on 13.

Q. And what was the reason or the purpose for Addison Miller turning on blue lights, say at the west end?

A. That is to signify to the men working around the yard that there are men working under, around or between cars, and that these cars are not to be coupled into or moved.

Q. And, Mr. Corrigan, during all the time that you were at the Yardley yards before July 17, 1952, did you ever see any Addison Miller employees dumping slush ice? A. No, I never did.

Q. Did you ever see any Addison Miller employees crawling under the couplers of Northern Pacific cars on either [636] Track 12 or Track 13?

A. No, I never did.

Mr. Cashatt: You may inquire.

Cross Examination

Q. (By Mr. MacGillivray): Mr. Corrigan, I un-

(Testimony of Francis T. Corrigan.)

derstand that at the yard office you have an ice foreman and an assistant ice foreman?

A. Yes. Two assistant ice foremen.

Q. Two assistants? A. Yes.

Q. And their duties, in part, are to determine just how much ice is used by Addison Miller in the icing of Northern Pacific cars? A. Yes.

Q. I presume the reason for that is that Northern Pacific pays Addison Miller perhaps per ton for ice used?

A. Well, really, that is out of my line. I suppose they do, I don't know.

Q. Yes. And does the ice foreman and his assistants keep track of the amount of salt used in the icing operations? A. Yes.

Q. Is that Addison Miller salt or is that Northern Pacific salt? [637]

A. I couldn't say who pays for it, I wouldn't say that.

Q. Then I understand, Mr. Corrigan, that frequently the Northern Pacific has an assistant ice foreman actually and physically down on the ice dock to measure the amount of salt and the amount of ice being used? A. At times, oh, yes.

Q. Yes. So I take it, Mr. Corrigan, from that practice that the Northern Pacific has a very vital and direct interest in the icing operations of Addison Miller Company?

Q. In what kind of operations, please?

Q. Icing operations?

A. Oh, yes, I imagine they have.

(Testimony of Francis T. Corrigan.)

Q. Well, you know they have?

A. Yes, you bet.

Q. Then you made the statement, Mr. Corrigan, that "We have a salt house under the salt dock."

A. Well, maybe I should clarify that and say there is a salt house.

Q. Well, that property belongs to the Northern Pacific, does it not?

A. I think it does, yes.

Q. The salt house, the icing dock, and the premises surrounding it?

A. I think the Northern Pacific owns it and I think it [638] leases it out or something.

Q. Yes. When you were an assistant yardmaster, did one of your duties entail going down on the ice dock?

A. I can't understand you, Mr. MacGillivray.

Q. When you were an assistant yardmaster——

A. Yes?

Q. Or an assistant general yardmaster, did one of your duties entail your going down on the icing dock from time to time? A. No, no.

Q. Have you ever been down on the icing dock?

A. Oh, yes, I have been down there.

Q. What is the length of that icing dock, approximately?

A. Well, it will hold 28 cars and we figure the over-all length of a car is 45 feet, that is, refrigerator, 45 feet, so multiply 28 by 45 and you have it.

(Testimony of Francis T. Corrigan.)

Q. That would be about 1,260 feet?

A. I guess, if that is what you get there, yes.

Q. In other words, that would be about four city blocks long, assuming a city block, as we consider, is about 300 feet in length?

A. About that, I guess.

Q. And on the top of that icing dock its full length are overhead white lights at approximately 40-foot intervals; do you know that? [639]

A. Yes, about that, I guess.

Q. On each side of the dock? A. Yes.

Q. Do you know how many lights there are?

A. No, I never counted them.

Q. Then, Mr. Corrigan, you say that you have checkers that check the cars in the yard at any given time? A. Yes.

Q. Are they working continuously around the clock? A. Yes.

Q. And they check car numbers? A. Yes.

Q. Do they check the exact location of each car and every car? A. Just on the track.

Q. Just on the track?

A. Not where it is located on the track, just on the track.

Q. So that an assistant yardmaster coming on at 7 o'clock, would he know at 8 o'clock where each and every car in that yard is?

A. Just give him a chance to pick up these checks and peruse them and he would have a pretty good idea on what tracks they are.

Q. He would have a general idea? [640]

(Testimony of Francis T. Corrigan.)

A. Yes.

Q. Now describe for us a cattle car, Mr. Corrigan. A. A cattle car?

Q. Yes.

Q. Well, they are ordinarily 40 feet long and, instead of being built solid, they are built with slats, which naturally leaves an opening so that the livestock loaded in them can get air.

Q. In other words, a cattle car is not a solid siding?

A. It is not a solid type, no.

Q. When did you return from vacation?

A. Let's see—well, I returned around about the end of the month. At that time, I got two weeks.

Q. And at the time you returned, there was quite an investigation underway concerning the accident of July 17th, do you recall?

Mr. Cashatt: I object to that, your Honor.

Mr. MacGillivray: It is preliminary, your Honor.

Mr. Cashatt: It is not material to the questions here.

The Court: I don't know just where it is leading. I will overrule the objection and see what develops.

Mr. MacGillivray: Read the question.

(The question was read.)

A. Well, nothing was said to me about it definitely. I [641] wasn't asked any questions or anything like that, if that is what you mean.

Q. I see. Well, after your return, Mr. Corrigan,

(Testimony of Francis T. Corrigan.)

did you find out the numbers of the two cars between which young Gerry Stintzi was injured?

A. No, I didn't.

Q. Did you ever see a picture of those two cars?

A. A picture of them?

Q. Yes? A. No, I never did.

Q. Never did? A. No.

Q. Do you know whether or not a picture of those two cars was taken the following day?

A. No, I don't know.

Q. Then, Mr. Corrigan, you say there is a company phone. By "company," you mean Northern Pacific phone between the icing dock and the yardmaster's office? A. Yes.

Q. And that phone is used quite frequently?

A. Whenever necessary.

Q. Whenever necessary. How do you make a connection between the yard office and the icing dock over that phone?

A. You just take the receiver off and I think it is one [642] long ring, one very long ring.

Q. Do you have a crank? A. A crank?

Q. Yes? A. A crank, yes.

Q. So that you can make a connection from the yard office to the icing dock within a matter of seconds on that phone?

A. If there is somebody there to answer it.

Q. And you stated that that phone is used for contact by Addison Miller to the Northern Pacific at the yard office and is used by the Northern Pacific to the Addison Miller? A. Yes.

(Testimony of Francis T. Corrigan.)

Q. And assuming, Mr. Corrigan, that the Northern Pacific at night after dark was drifting 14 unattended freight cars from the Old Main in front of the yard office down the lead onto Track 13 at a time when it was known that there were cars on Track 13 immediately opposite the icing dock and at a time that the white lights on the top of the icing dock were illuminated, it would have taken how long by use of that phone to advise the icing dock of the approach of those cars?

Mr. Cashatt: Just a minute. I object to that, your Honor, as not being a proper hypothetical question put to [643] this witness. He has testified that they could turn a crank.

The Court: Well, I will overrule the objection, if he feels he can make an answer.

Mr. MacGillivray: Do you remember the question, Mr. Corrigan?

A. Please repeat the question.

(The question was read.)

A. Well, had anyone done it, it would all depended how close someone was to the telephone to answer it.

Q. It would be a matter of seconds, wouldn't it?

A. And it would also depend how fast these cars were traveling.

Q. Well, the speed of the cars would have nothing to do with your telephone connection, would it, Mr. Corrigan? A. It might.

Q. Why is that?

A. Might kick them pretty hard.

(Testimony of Francis T. Corrigan.)

Q. Pardon?

A. You might kick them pretty hard.

Q. Do they sometimes kick them pretty hard?

A. Yes, we do.

Q. Well, what I am getting at, Mr. Corrigan——

The Court: I think what he is asking is how long it would take to telephone from one place. That wouldn't depend [644] on how fast the cars were moving. He is just asking you how long it would take to telephone.

A. That is hard to answer because it is hard to tell whether anybody would be there to answer it or not.

Q. Well, assuming somebody was there on top of the ice dock in the immediate vicinity of that phone?

Mr. Cashatt: Now, your Honor, I believe that is too speculative, assuming and assuming and assuming.

Mr. Etter: I don't think it is.

A. I wouldn't want to set any definite time.

Q. (By Mr. MacGillivray): Well, it would be a matter of seconds, wouldn't it, Mr. Corrigan?

A. Well, I believe it would be a little bit longer than seconds.

Q. A matter of a minute?

A. Yes, two or three minutes.

Q. Two or three minutes?

A. A couple of minutes, anyway, I would say that.

Q. And, Mr. Corrigan, assuming that you turned

(Testimony of Francis T. Corrigan.)

14 cars loose in front of the yard office traveling three to four miles an hour, approximately what time would it take those cars drifting down the Old Main onto the lead onto Track 13 to reach the yard? A. To reach the what?

Q. The icing dock, I'm sorry? [645]

A. I think he is getting a little bit deep for me.

Q. Well, do you have any idea?

A. No, I would not say.

Q. It would take six or seven minutes, wouldn't it? A. I don't know.

Q. You don't know?

A. No, I don't think so.

Q. Mr. Corrigan, do you know how close the south rail of Track 13 is to the icing dock, the salt house? A. Well, I think it is standard clearance.

Q. What is standard clearance?

A. A little bit better than standard clearance.

Q. What is standard clearance?

A. Standard clearance is 8 feet from the center of the gage.

Q. Well, not the center of the gage, but from the south rail? This might help you, looking at Plaintiff's Exhibit No. 10, would you tell me the distance from that south rail to the edge of the salt house and the icing dock?

A. I would say 8 to 9 feet. No, from the south rail, you say?

Q. From the south rail?

A. Oh, yes. Oh, I would say pretty close to five feet, between four and five feet. [646]

(Testimony of Francis T. Corrigan.)

Q. Between four and five feet?

A. Yes.

Q. And with the freight car on Track 13, such as shown in Exhibit No. 10, what would be the distance from the south side of that freight car to the wall of the salt house and icing dock?

A. Oh, I would say—let's see—around a little bit short of four feet, about three feet.

Q. Some place——

A. A little bit better than three feet.

Q. Some place between three and four feet?

A. Yes.

Q. Then, Mr. Corrigan, from your long experience out there at the yard, you were familiar with the fact that immediately to the north of Track 13 and between Track 13 and Track 14 there is a common dumping ground? A. Yes.

Q. And you are familiar with the fact that salt sacks used by Addison Miller in the icing operation, when emptied, were dumped at that common dumping ground?

Mr. Cashatt: Your Honor, I believe I will object to that. It is outside of the scope of the direct.

Mr. MacGillivray: He has testified to all of the operations in the yard.

The Court: I think he has pretty generally. I will [647] overrule the objection.

Mr. MacGillivray: Read the question back.

A. Well, it was always my understanding that the salt sacks were saved.

(Testimony of Francis T. Corrigan.)

Q. Have you never seen any salt sacks in that common dumping ground?

A. I can't say that I have. There is so much refuse there that I wouldn't say that I had, no.

Q. Mr. Corrigan——

A. Wait a minute, just a minute. Are they using paper or burlap?

Q. I was just going to ask you, aren't the salt sacks paper sacks?

A. I don't handle the sacks at all.

Q. Have you never seen them?

A. Yes, and all that I ever saw was in burlap bags.

Q. Well, handing you what is marked as Plaintiff's Exhibit 11, don't you see any salt sacks in that common dumping ground, a lot of them?

A. Well, if these are salt sacks, yes.

Q. Well, they are some kind of paper sacks, aren't they? A. Oh, yes.

Q. Yes.

A. But they could have come out of the cars off of 14, as far as I know. [648]

Q. Well, as I gather, then, you didn't know that Addison Miller used that common dumping ground for the dumping of empty paper salt sacks?

A. No, I didn't.

Q. And, Mr. Corrigan, you said that prior to July 17, 1952 you had a practice at the icing dock concerning the use of a blue light?

A. While they are icing cars?

Q. Yes? A. Oh, yes.

(Testimony of Francis T. Corrigan.)

Q. And that practice was supposed to be followed when anyone was working on or around, I believe, to use your words, that that signal was to be used and was to mean that men were working, Addison Miller men were working under, around and between Northern Pacific cars; is that correct?

A. I didn't say Addison Miller men, I said anybody.

Q. Well, including Addison Miller men?

A. I suppose so, yes.

Q. That practice has been changed since this tragedy of July 17, 1952, has it not?

Mr. Cashatt: Just a minute, I object to that, your Honor. I don't believe it is material what the situation is since.

The Court: Yes, I will sustain the objection.

Q. (By Mr. MacGillivray): Then, Mr. Corrigan, you say it is a common practice to let cars drift down the tracks at the Yardley yard unattended?

A. Oh, yes, that is the way we switch cars.

Q. Whether during the day or whether during the hours of darkness?

A. Yes, that doesn't make any difference.

Q. And does that statement apply to all of the tracks in the Yardley yard?

A. All the trainyard tracks.

Q. All the trainyard tracks? A. Yes.

Q. And prior to July 17, 1952, that practice had been in effect for how long? During all of your experience?

A. Ever since I have been here, yes.

(Testimony of Francis T. Corrigan.)

Q. And is there any difference in that custom and practice and was there any difference prior to July 17, 1952 on any of the trainyard tracks?

A. Not if there was no blue light or blue flag or anything displayed, no, the practice was the same.

Q. In other words, Mr. Corrigan, prior to July 17, 1952, Tracks 13 and 12 were treated by Northern Pacific employees at the yard the same as any other track, 1 to 12 and 14 to 18?

A. Oh, yes. [650]

Q. In other words, it did not enter into the scheme of things there at the Yardley yard prior to July 17, 1952 that between Tracks 13 and 12 and within four to five feet of both tracks, you had an icing dock on and around which men were working in icing operations?

Mr. McKevitt: That is objected to as argumentative in the form in which that question was put.

Mr. MacGillivray: I don't believe it was. Read it back.

The Court: Read the question.

(The question was read.)

The Court: I think that is argumentative. I will sustain the objection.

Q. (By Mr. MacGillivray): Well, did it enter into the considerations of the Northern Pacific employees at the Yardley yard that between Tracks 12 and 13 there was an icing dock on and around which men were continuously working?

Mr. McKevitt: Objected to as incompetent, ir-

(Testimony of Francis T. Corrigan.)

relevant and immaterial. Also object to the form of the question.

The Court: Overruled, he may answer.

A. Read the question again.

(The question was read.)

A. Men are not continuously working there.

Q. (By Mr. MacGillivray): Well, say frequently working?

A. I wouldn't say frequently working.

Q. Well, you tell us.

A. I would say that between 20 out of 24 hours in a day, there isn't anyone working around there.

Q. Well, does that apply in the months of July and August?

A. It just all depends how many fruit trains we happen to be running and how many perishable loads we happen to have at a particular time.

Q. Well, so we don't quibble, Mr. Corrigan, did those facts enter into consideration with the Great Northern employees so far as Tracks 12 and 13, changing the word "continuously" to "occasionally?"

Mr. McKevitt: Same general objection, your Honor, to this line of questioning, incompetent, irrelevant and immaterial.

The Court: Well, overruled.

Mr. MacGillivray: Do you understand the question now, Mr. Corrigan?

Mr. McKevitt: Two separate questions.

The Court: I am not sure that is a fair question of this witness unless he had control of the policy

(Testimony of Francis T. Corrigan.)

of the railroad company. He said that those tracks are treated the same as the other tracks. Now why it was done, of course, he wasn't the one to decide, was he? [652]

Mr. MacGillivray: Except he is the general yardmaster in full charge of the Yardley yard, your Honor.

Mr. McKevitt: Yes, but he has no authority to rebuild those tracks to that ice dock.

The Court: I permitted him to answer it. What was the answer?

A. I never answered it yet because he got to talking about the Great Northern, I think.

Mr. MacGillivray: Well, you know I am talking about the Northern Pacific.

A. Well, really, I don't get the gist of the question, to be honest with you.

Q. Well, you say you treated Tracks 12 and 13 the same as Tracks 1 and 2 or 17 and 18?

A. 7 and 8, did you say?

Q. 17 and 18.

A. No, don't include 17 or 18.

Q. Well, 1 and 2, then? A. Yes.

Q. What I am wondering, Mr. Corrigan, is prior to July 17, 1952, the date of this tragedy, did the Northern Pacific and its employees, including yourself, take into consideration from a safety standpoint the fact that between Tracks 12 and 13 there was an icing dock upon which employees of Addison Miller, during daytime [653] and during the night, were occasionally working?

(Testimony of Francis T. Corrigan.)

Mr. McKevitt: Same objection, if your Honor pleases.

The Court: Overruled.

A. You said on top of the dock?

Q. (By Mr. MacGillivray): On or around the dock?

A. It all depended on what was taking place down around that dock.

Q. All right. How long, Mr. Corrigan, in your experience out there have you been acquainted with the nature of the crew employed by Addison Miller on that icing dock?

A. Well, who do you include in that?

Q. The general laborers?

A. I don't know one from the other.

Q. Well, do you know, Mr. Corrigan, that it has been the practice of Addison Miller of employing as a good percentage of that crew high school kids?

A. Well, when they need men real bad, they just hire anybody that comes along, is my understanding.

Q. And that has been the practice ever since you have been in the yard?

A. It all depends on how bad they need men.

Mr. MacGillivray: That is all. [654]

Redirect Examination

Q. (By Mr. Cashatt): Mr. Corrigan, Mr. MacGillivray asked you how long it would take for you to get in touch with the Addison Miller dock over this phone if these cars were rolling down the

(Testimony of Francis T. Corrigan.)

Recross Examination

Q. (By Mr. MacGillivray): Mr. Corrigan, speaking of this blue light, you were speaking of prior to July 17, 1952, you made the remark that at that time "We had electric lanterns on the icing dock."

A. They had——

Mr. Cashatt: Just a minute. Did you finish your question?

Mr. MacGillivray: Yes.

Q. Is that correct?

A. There was a dividing time in there some place where they used electric lanterns and also the oil lamp, but they both worked, they both hung on a bracket at the [657] end of the dock just the same.

Q. What do you have on there now?

Mr. Cashatt: I object to that, your Honor.

The Court: Sustained.

Mr. Cashatt: As improper.

Mr. MacGillivray: I would like to be heard just a second on this.

The Court: All right, I will excuse the jury until 1:30, then.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: All right, I will hear you on that now.

Mr. MacGillivray: Your Honor, the purpose is to bring out evidence as to practices adopted since the accident of July 17, 1952. It is not for the purpose of showing negligence on the part of the

(Testimony of Francis T. Corrigan.)

Northern Pacific on that date, but is being brought out for the purpose of showing that there was another or a practical method of safeguarding the condition there on the night of July 17, 1952.

On that, I might refer your Honor to the case of Hatcher vs. Globe Union Manufacturing Company——

Mr. McKevitt: What is that citation?

Mr. MacGillivray: 178 Washington, 411—where it was held that on the issues as to negligence in the presence [658] of poisonous dust in a factory, evidence of measures taken subsequently to install a suction device to carry off the dust is not admissible to prove negligence, but is admissible when expressly limited to the practicability of safeguarding the instrumentality.

The case of Cochran vs. Harrison Hospital, 42 Washington (2d), 264:

"As a general rule, evidence of subsequent repairs is not admissible to prove prior negligence. An exception to that rule is that such evidence may be admitted for the limited purpose of showing dominion or control over the instrumentality or to show the practicality of the use of a safeguard."

There are other Federal cases here, I believe, to the same effect: 87 Federal Supplement, 706; 156 Federal (2d), 109, and 156 Federal (2), 112. Then another case, 186 Federal (2d), 134.

Mr. Cashatt: Your Honor, in this situation we have, of course, the two companies, we have Addison Miller and we have Northern Pacific. If Ad-

(Testimony of Francis T. Corrigan.)

dison Miller has done things since this accident occurred——

The Court: Let me ask you, Mr. Gillivray, what do you propose to show by this line of questioning? I could [659] tell more about it if I know what it is you have in mind.

Mr. MacGillivray: Well, I propose to show any safety measures taken, not by Addison Miller, but by the Northern Pacific, to safeguard the conditions existing at the icing dock subsequent to July 17, 1952. I am not interested in any measures that might have been taken, if such were taken or have been taken, by Addison Miller; I am interested only in measures taken by the Northern Pacific.

The Court: Well, it is a little difficult. If you inquire and it appears that measures have been taken by Addison Miller, it is going to be prejudicial, isn't it, to the defendant here, even though I instruct the jury to disregard it?

I think there should be some reasonable prospect of eliciting that the N. P. has taken measures that can be taken as indicating that other safety measures were possible and practical at the time of the accident and before.

Mr. MacGillivray: I don't think that should be prejudicial to the defense here, because, as I understand, the basic defense is to lay the blame on them and say the blame is all Addison Miller.

Mr. McKevitt: No, no, that isn't the basic defense. Don't tell us what the defense is.

The Court: I think, Mr. Cashatt, perhaps we

will get some opportunity to look at these cases during the noon [660] hour and we will both be in a better position to discuss this.

Mr. Cashatt: Fine.

The Court: If I should think they warrant admission of the evidence.

So we will recess until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 p.m., this date.) [661]

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had in the absence of the jury:)

The Court: I have examined the two Washington cases that you cited, Mr. MacGillivray, and some of the others I had difficulty finding them. I think that I probably put the page or volume down wrong here. I was primarily interested in the Washington cases, anyway.

I will hear you, then, if you care to be heard on it.

Mr. Cashatt: Your Honor, I just had a few minutes and I briefly went through the two Washington cases. I hardly had time to read them, but the main distinction I would say there is the fact that there is no question about who made the change or anything, and in our case here we have the situation where the plaintiff was the employee of Addison Miller and not the Northern Pacific Railway. And if we get into any question about changes made subsequently, I think it opens up a broad

field as to whose changes they were, and so on and so forth.

And, further, that the cases cited I don't believe [664] are applicable to the situation we have here. After an accident occurs, we all know that things can be done, there is no limit. It always has been history that we are not infallible and that when something happens, better things can be done later.

But I principally urge that it would be prejudicial to the defendant in this case, your Honor, because of the fact that we do have Addison Miller and Northern Pacific in here, and there wouldn't be any way that counsel could question Northern Pacific witnesses or Addison Miller witnesses as to what was theirs and what was the other, and I just sincerely feel that it certainly would be prejudicial to the defendant Northern Pacific in this case to permit the evidence of that nature to go in.

The Court: Well, I think I had occasion to apply this rule in a prior case here, that was a case involving a railroad company and its employee, and I was under the impression that it was a master and servant rule, and I notice in looking at these cases that for the most part the question seems to arise and the rule seems to have been announced in master and servant cases, but I also notice that there isn't any qualification in the statement of the rule that it is limited to protection of a servant or employee by an employer.

And in the case of Cochran vs. Harrison Memorial [665] Hospital, 42 Washington (2d), 264, the Supreme Court of the State of Washington recog-

nized the rule and stated it and applied it in a case that didn't involve master and servant at all. That was a case where a patient in a hospital fell out of the bed and there was a question of whether they properly protected her from that sort of an accident.

I think that counsel should be permitted to cross-examine for the purpose only, of course, of showing, if he can, that measures were taken—I won't say by the Northern Pacific Railroad Company, but measures in which the Northern Pacific Railway Company participated, in order to show only that it was practicable to safeguard the men working about the Addison Miller dock in some manner other than the blue light method.

Now you have to bear in mind here that this method upon which the defendant relies was one that was, I presume, as far as the evidence shows, jointly installed and jointly operated by Addison Miller and the railroad company. The blue light was on the dock, the Addison Miller dock, and the railroad employees honored it, so that one of them would put up the blue light, the Addison Miller foreman, and the switchmen would honor it. Now if some mutual arrangement was made other than that subsequently, why it seems to me that the railroad company would be bound by it, even though Addison Miller participated in it. If it were wholly [666] something that Addison Miller did without any collaboration by the Northern Pacific, that might be different, but here we have the two of them working the blue light method. Now if the

two of them use some subsequent method, I think that that evidence would be permissible here for the limited purpose indicated by the Washington Supreme Court, and I think the Court should so instruct the jury.

I can't certainly sit here and say to counsel for the plaintiff, "You can't cross-examine this witness to try to bring this out because it might develop after you have cross-examined that the measures were only those of Addison Miller." I have no right to assume that in advance, if the cross-examination is in good faith pursued, and I haven't reason at this stage to think otherwise.

Mr. Cashatt: I have one other question, then, your Honor, might as well take it up now, I think it might save time.

Under your Honor's ruling, then, I believe it would be in order for us to present evidence showing what Addison Miller has done since this accident to prevent a recurrence of the same thing.

Mr. Etter: That is the thing the Court says is qualified so far as our inquiry is concerned. The good faith has got to involve both of them; we can't pin it on Addison Miller, as I understand the qualification. [667]

Mr. Cashatt: The matter I have in mind, your Honor, they have put up big signs right at this doorway. One of them is "Do Not Dump Slush Across the Track," and the other one, "Be Careful. Cars will be moved at any time." The evidence would show that was done solely by Addison Miller

for the protection of their own employees, and I am raising it now because it might be anticipated.

The Court: I don't know on what theory that would be admissible, because certainly you are not conceding that the Northern Pacific is liable for any negligence on the part of Addison Miller.

Mr. Cashatt: No, but this is a situation, your Honor, that the negligence in this case was Addison Miller's, anyway, not that of Northern Pacific.

Mr. McKevitt: The question of proximate cause enters into it.

Mr. Cashatt: That's right.

The Court: What do you think about that, Mr. MacGillivray?

Mr. MacGillivray: The question, as I see it, as your Honor has indicated, is, first, what safeguards and changes have been made by the Northern Pacific individually since July 17th; secondly, what changes and safeguards have been instituted by Northern Pacific and Addison Miller, if any, jointly since July 17, 1952. Any changes or safeguards [668] adopted by Addison Miller individually would not be admissible.

The Court: Of course, what you are doing there is you are bringing around on the other side now, or attempting to do so, what the Supreme Court says this evidence must not be used for. What you are trying to use it for is to show the negligence of Addison Miller, but Addison Miller was negligent and have recognized it because they have made changes to safeguard it subsequently.

Now that use of the evidence can't be used by you or by the other side either.

Mr. Cashatt: That wasn't my purpose, your Honor. My purpose, just like the signs I mentioned, is to show that that could have been done in a safer way, not to go across the tracks, and so it is for the same purpose as the plaintiff is requesting that the other be permitted; not to show negligence, but it is on that theory, that the instruction and the practice out there now shows that it could have been done in a safer way than it was before.

Mr. MacGillivray: We are not here concerned with the actions, either before or after, of Addison Miller; we are here concerned with the actions individually or actions in which the Northern Pacific took part.

The Court: Well, you are only incidentally concerned with the actions of Addison Miller. If the negligence of Addison Miller is the sole cause of the injury, then, of [669] course, the verdict would have to be for the defendant.

Mr. McKevitt: That's right. The proximate cause of the accident has got to be determined in some manner, certainly.

The Court: But I can't see that you have involved here the duty of Addison Miller to protect its employees. What we are concerned with is whether Addison Miller was guilty of negligence or not, and, of course, if you show what signs they have put up and what precautions they have taken later, then we go into the question of the duty of

Addison Miller towards its employee, which I don't think is material here.

Mr. McKevitt: Well, my position is this, then, in dealing with the question of what was the proximate cause of this accident or one of the proximate causes: That if the evidence disclosed that Addison Miller's foreman directed this boy to do something that was inherently dangerous, and because of his extreme youth he thought he had to obey that, why then I think we would be entitled to show that it wasn't our negligence that put him in that position. He couldn't have gotten hurt unless he got in that position, and surely the N.P. didn't put him there, Addison Miller put him there.

The Court: I think the answer there is that if Addison Miller's negligence is the sole negligence, then the verdict should be for the defendant. [670]

Mr. McKevitt: That's right.

The Court: If there was some incidental negligence that substantially contributed on the part of the Northern Pacific, then, of course, the Northern Pacific would be liable in the absence of contributory negligence.

Mr. Etter: In other words, if there were two proximate causes. In other words, counsel mentioned one of the proximate causes; well, if it so happens that one of the proximate causes is Addison Miller's and one of the proximate causes is Northern Pacific's, the proximate cause of Addison Miller is disregarded and is no defense to Northern Pacific.

Mr. McKevitt: No, we are talking about the question of concurring negligence.

(Whereupon, the following proceedings were had [673] in the presence of the jury:)

The Court: Proceed.

FRANCIS T. CORRIGAN

having been previously sworn, resumed the stand and testified further as follows:

Recross Examination—(Continued)

Q. (By Mr. MacGillivray): Mr. Corrigan, since July 17, 1952, what procedures and safeguards have been adopted by the Northern Pacific Railway looking toward the protection of employees of Addison Miller who might be working on or about the icing dock of Addison Miller on or about Tracks 12 and 13?

Mr. Cashatt: Just if he knows of his own knowledge, your Honor.

A. The Northern Pacific management has instructed Addison Miller that they will take means to give their men more protection while these men are working around the ice dock performing the services for which they are employed.

Q. (By Mr. MacGillivray): What means have been suggested by Northern Pacific?

A. The superintendent of Addison Miller—I want to [674] qualify that. I think it is the superintendent. There is a Mr. Anderson was given instructions to have the foreman of Addison Miller Company give the yardmaster advance notice when he was going to do any work around the ice dock.

Q. And has that procedure been adopted since July 17, 1952?

(Testimony of Francis T. Corrigan.)

A. Well, really, I am not in a position to answer that because I am not on duty out there 24 hours a day and I don't have the direct connection with that work, so I wouldn't care to answer.

Q. Well, has that procedure been in effect since July 17, 1952, during the 8 hours that you are present and working in the yardmaster's office?

A. Well, during the 8 hours that I am actually on duty there, I might be in my office and I might be down at the passenger depot, down at the Erie Street yard, down at the east end of the yard, any place where my duties would force me to go, so that would be handled by the assistant general yardmaster on duty and I wouldn't be able to answer that definitely.

Q. Well, he is under your supervision?

A. Yes.

Q. And the suggestions to Addison Miller, were they made by you or by one of your assistants under your [675] supervision?

A. Well, really, I don't know just exactly where the suggestion did come from, to be honest with you. I was called up in the office relative to that, and where it came from, I do not know.

Q. Well, didn't you convey those suggestions to Addison Miller? A. No, I didn't.

Q. They were conveyed under your supervision by one of your assistants? A. No, no.

Q. By whom?

A. My conversation regarding this point with Mr. Anderson was made with the superintendent

(Testimony of Francis T. Corrigan.)

of the Idaho Division at that time, who was then Mr. Dorfler.

Q. Well, you were a party to that conversation?

A. Yes, yes.

Q. And in that conversation, it was the understanding and conclusion of those involved, both representing Northern Pacific and Addison Miller, that additional safeguards to protect employees, in addition to those existing prior to July 17, 1952, were necessary?

Mr. Cashatt: I object to that, your Honor.

The Court: Yes, I think that is objectionable. Ask him what the arrangement was. [676]

Q. (By Mr. MacGillivray): Who all was in this conversation suggesting additional safeguards after July 17, 1952?

A. Mr. Dorfler, who was then the superintendent of the Idaho Division——

Q. Yourself?

A. Mr. Anderson and myself.

Q. When was that conversation held?

A. Oh, I would say early in February, 1953.

Q. February, 1953? A. Yes.

Q. Nothing was done between July 17, '52 and February, '53?

Mr. Cashatt: Object to that.

Q. (By Mr. MacGillivray): Was anything done?

The Court: What was that last question?

Mr. MacGillivray: Was anything done between July 17, '52 and February, '53?

A. May I answer?

(Testimony of Francis T. Corrigan.)

The Court: Yes, you may answer.

A. No.

Q. During those two dates, you operated in the same old way, is that correct?

Mr. Cashatt: I object to that, your Honor.

The Court: Well, I think I will sustain the objection on that. [677]

Q. (By Mr. MacGillivray): Other than that one suggestion, had other procedures been inaugurated by the Northern Pacific?

A. About what?

Q. To safeguard employees of Addison Miller?

A. No, I wouldn't say that there has been any radical changes made.

Q. Well, have any procedures been adopted and inaugurated by the Northern Pacific and Addison Miller acting jointly to protect and safeguard employees of Addison Miller on and about the tracks since July 17, 1952?

A. Well, not to my knowledge, no.

Q. Well, is it not a fact, Mr. Corrigan, that since that date, you do not float empty unattended cars at night into Tracks 12 or 13 adjacent to the Addison Miller dock when the white lights on that dock are illuminated and men are working on and about that dock?

Mr. Cashatt: I object to that. I believe that is getting outside the scope of your Honor's ruling.

The Court: Overruled.

Mr. McKevitt: Understand the question?

(Testimony of Francis T. Corrigan.)

Mr. MacGillivray: Read the question.

(The question was read.)

A. The white lights to us don't mean a thing.

Q. (By Mr. MacGillivray): They didn't prior to July 17, [678] 1952? A. Never did.

Q. And do I understand they still don't?

A. They still don't.

Mr. MacGillivray: That is all.

The Court: Before you proceed with your redirect examination, I think I should just say briefly, members of the jury, that I will instruct you at the conclusion of all the evidence of the rules of law that you are to follow in arriving at your verdict, but I think at this stage I should tell you that this particular evidence is admitted for only a particular purpose and should be considered only for that purpose.

Any safeguards that you may find from this testimony that the Northern Pacific Railway Company took by way of protecting workers of Addison Miller around this icing dock in their work there, any that you may find from this evidence that were taken since July 17, 1952, the date of the accident, is not to be considered as evidence of negligence on the part of the Northern Pacific Railway Company so far as the injury of this minor Gerald Stintzi is concerned. It is admitted only for the limited purpose of bearing on the question to show the practicability of additional safeguards other than those employed on July 17, 1952.

(Testimony of Francis T. Corrigan.)

It is to be considered only for that purpose, as to [679] the practicability of the safeguards.

You may proceed, then.

Redirect Examination

Q. (By Mr. Cashatt): Mr. Corrigan, you just answered one of counsel's questions that the white lights didn't mean anything to you. Mr. Corrigan, what do the blue lights mean to you as far as the Addison Miller employees are concerned and as far as your own employees are concerned?

Mr. MacGillivray: Objected to as improper redirect and repetition.

The Court: It is about the third time he has said, it seems to me——

Mr. MacGillivray: That's right.

The Court: ——that they protect the cars along the dock; isn't that it?

A. Protect the men working around the cars.

The Court: You don't move into those cars when the blue lights are on on either Track 13 or 12?

A. That's right.

The Court: I think he has covered that.

Mr. Cashatt: Well, that is all.

The Court: Any other questions?

Mr. MacGillivray: That is all. [680]

The Court: That is all, then, Mr. Corrigan.

(Witness excused.)

Mr. Cashatt: Mr. Williams, please.

GORDON WILLIAMS

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name is Gordon Williams? A. Yes.

Q. And where do you reside?

A. North 4003 Post.

Q. How long have you lived in Spokane?

A. Since 1938.

Q. And what is your occupation?

A. I am a railway clerk.

Q. By whom are you employed?

A. Northern Pacific Railroad.

Q. How long have you worked for the Northern Pacific Railroad? A. January of 1942.

Q. And can you tell us anything more specific about your job as a clerk?

A. Well, since 1949 I have been employed as an ice foreman [681] for the Northern Pacific.

Q. And where are you located? Where do you do your work?

A. Yardley yard, Washington.

Q. And you have followed that work since 1949, have you?

A. In this particular department, yes.

Q. Now what are the duties of that job as ice foreman, and are they the same now as they were back in 1952?

A. There has been no radical changes, no.

Q. Well, what were they, say, in July, 1952?

(Testimony of Gordon Williams.)

A. Well, the Northern Pacific has on duty 24 hours a day an ice foreman at Yardley yard. He, in turn, depending on the amount of traffic in that particular shift or time, calls out a certain amount of helpers. I suppose they have been referred to here in the past as assistant ice foreman, but they are actually called ice helpers. And it is our responsibility to instruct and advise Addison Miller of the amount of cars coming in, the amount of icers that the trains will have on them, the times they will arrive. It is up to us to keep a record of much much salt and ice is used in these various cars. It is also up to us to see that they are properly heated and ventilated in the winter time and such as that. It is up to us to see that the yardmaster is notified when these cars are spotted, when Addison Miller is finished with their icing of these [682] certain cars, it is up to us to instruct the yardmaster that they are done, and he, in turn, has the switch engine take them off.

Q. And in your work, Mr. Williams, do you keep track of the salt cars that come into the Yardley yard?

A. Yes, it is up to us to keep track of the salt, that is, its arrival in the yard, the time it is unloaded. In fact, the day ice foreman orders all the salt that is used for the icing operations at Yardley.

Q. Now on July 17, 1952, did you work that particular day? A. Yes, I did.

Q. And what time did you come to work that day? A. 4 p.m.

(Testimony of Gordon Williams.)

Q. In the course of your work that day from the time you arrived, did you make a written record of the cars that came in the yards that were iced?

A. That is part of my duties as an ice foreman is to keep a record of all the perishables that entered the yard.

Mr. Cashatt: Your Honor, I would like to just offer the day of July 17, 1952, but I want to show that it is right out of the original book, and I can have the witness open it and take it out over there, if that is agreeable.

The Court: Well, all right.

Mr. Cashatt: (To Clerk) These sheets, I think if [683] you will mark those and we will staple those together.

The Clerk: Marked as Defendant's 38 for identification.

Q. (By Mr. Cashatt): Mr. Williams, the book I am now handing you that has some of the sheets marked Defendant's Exhibit No. 38, what is this book?

A. This is what we term as a 1755 form. It is a record of all perishables that go through or stop in the City of Spokane.

Q. At Yardley?

A. At Yardley, Washington.

Q. And is that record made up from day to day?

A. From day to day, yes. It starts at 12:01 each day.

Q. When you came on shift at 4 o'clock on

(Testimony of Gordon Williams.)

July 17, 1952, did you make the record until you went off shift that evening? A. Yes.

Q. And what time did you go off shift that evening? A. 12 midnight.

Q. Mr. Williams, referring you to the sheets marked Defendant's Exhibit No. 38 for identification, 1, 2, 3, 4, 5, 6, are those the entries that you made on July 17, 1952?

A. This here is part of my work, too (indicating).

Q. Should be one more sheet? [684]

A. This sheet right here (indicating).

Q. Fine. Do you have a knife there that you could open this, Mr. Williams?

Mr. McKevitt: How many sheets, Mr. Cashatt, are there?

Mr. Cashatt: Seven sheets.

Q. You are now, Mr. Williams, taking the 7 sheets marked as Defendant's Exhibit No. 38 for identification out of the book which cover all entries for the month of July, is that correct?

A. That's right, that covers my shift.

Q. And this covers your shift from 4 o'clock in the afternoon on July 17, 1952, until midnight?

A. That's right.

Mr. Cashatt: Offering Defendant's Exhibit No. 38.

Mr. Etter: May I question the witness?

The Court: Yes.

(Testimony of Gordon Williams.)

Voir Dire Examination

Q. (By Mr. Etter): These records were made by you, were they, Mr. Williams?

A. That's right.

Q. These sheets that you have identified that are marked as the Defendant's Exhibit 38? [685]

A. Yes, sir.

Q. Do they indicate the refrigerator cars that came in?

A. All that is written on that report is refrigerator cars. There is no other type of car written on that 1755 report.

Q. Other than a refrigerator car?

A. That's right.

Q. Is that correct? A. That's right.

Q. These are cars that came in?

A. That's right, sir.

Q. These cars that you received in the yard on the 17th of July, Mr. Williams, refrigerator cars, as you say, are those cars filled when they come in, or are they packed with perishables from the time they come in?

A. Yes, sir. Of course, now, this covers various icing and protecting parts. Well, to take care of the business of the Northern Pacific, you might say, sometimes we will initially ice an empty and that may be on——

Q. What?

A. Initially ice an empty reeefer, but that would be on that record, but that is still a refrigerator car.

(Testimony of Gordon Williams.)

Q. I see. What I am trying to get at, though, are all these refrigerator cars, are they full of perishables, the cars that are listed that have been received in? [686]

A. If they show on that record as loads, they will be loads.

Q. I see. Where do you find that out by looking at this record?

A. Right there where it says "Commodity," I believe. This here (indicating) would be the contents of the car.

Mr. McKevitt: Can't hear you.

Mr. Etter: Speak out a little louder, we can't hear you.

A. On this report it shows contents of cars, and there we show the commodity that is in the reefer.

Q. Where you have this long mark running down here under "Contents," does that mean spuds?

A. That means spuds, that is a ditto.

Q. That is a ditto mark, is that the idea?

A. Yes.

Q. Do you bring in tires in a refrigerator car?

A. They do sometimes, yes.

Q. They do. Getting educated.

Mr. McKevitt: Rubber can melt.

Q. (By Mr. Etter): These cars that are numbered here and that are brought in, the various services that you say are performed upon them, are indicated here? A. Yes, sir.

Mr. Etter: No objection. [687]

(Testimony of Gordon Williams.)

The Court: It will be admitted.

(Whereupon, the said sheets were admitted in evidence as Defendant's Exhibit No. 38.)

Q. (By Mr. Cashatt): Mr. Williams, I see the first entry, is that a single car, the first one on Exhibit No. 38? A. This is.

Q. Yes.

A. That is one car. This "SLRX," this here would mean that there was two cars in this train that arrived.

Q. And I see a time of 3:45 p.m.; what can you tell us about that?

A. 3:45 is the time the train arrived.

Q. And does it show what time those cars were finished icing?

A. The cars were spotted at 4:25 p.m. and they were done icing at 4:35 p.m.

Q. Then next I see designation Train 5112 and "4-p" after that. What does that mean?

A. That means that 5112 arrived at 4 p.m.

Q. Is that a number of a train?

A. That's right, that is an engine number.

Mr. McKevitt: Engine number. [688]

Q. (By Mr. Cashatt): And that arrived at 4 p.m.? A. Yes.

Q. How many cars were there in Train No. 5112?

A. Well, I would have to count them, I don't know. Do you want me to count them?

Q. Yes. I would like to have you count them.

A. 56 cars.

(Testimony of Gordon Williams.)

Q. 56 cars in that train. And what time did that train arrive? A. At 4 p.m.

Q. And what was done with that train, does this record show, or does this record go into that?

A. Well, this record, it shows a spot of 4:05 and that would mean that the train was more than likely ran right into Track No. 12 at the east end of the dock and they cut the air and set the head end over to 13. It shows a spot of 4:05 p.m. here.

Q. That means that it was put on Track 12 and 13, does it?

A. I would say that is what happened.

Q. Does the record show what time Train No. 5112 was iced or the icing operation was completed?

A. The first spot shows 4:05 and we were done icing with the first spot at 5:05. We received a second spot, it looks like, at 5:15, and we were done icing the second spot at 6:10. [689]

Q. And then was the train put back together?

A. Well, it left town, I imagine it was.

Q. What time did it leave town?

A. 7 p.m.

Q. And does that show on Exhibit 38?

A. It shows departure, yes, 7 p.m.

Q. And that time 7 p.m. is under the heading "Forwarded" with the designation "Time," is that right? A. That's right.

Q. Now after that train left at 7 o'clock, when did the next refrigerator cars arrive in Yardley, Washington from any place?

(Testimony of Gordon Williams.)

A. We had an S. P. & S. train come in at 6:35 p.m. with one car of tomatoes.

Q. And what was done with that one car of tomatoes?

A. Well, according to the instructions on the weigh bill, it was not necessary to spot it to the dock, so apparently the car was inspected on the track that it arrived on and was then—I see that it is a city load—was more than likely switched into Track 6 and sent to town.

Q. In other words, that car wasn't iced, is that right?

A. No, sir, we show servicing at 8:05 p.m. and that is the extent of the service to it.

Q. Then was that car spotted on either Track 12 or 13? [690]

A. No, sir, I don't believe it was.

Q. Then following that, Mr. Williams, when was the next refrigerator cars to arrive on this July 17, 1952?

A. The 6019 arrived at 9:55 p.m.

Q. And were any cars in that train iced?

A. No, sir, they were not.

Q. Following the arrival of that train, anything further while you still were on shift until 12 o'clock that night?

A. 5402 arrived at 11:35 p.m. and he had one icer, and that was spotted at 11:50 and okayed at 12:01 a.m. That would be the 18th.

The Court: Are we interested in trains that ar-

(Testimony of Gordon Williams.)

rived after the accident here? Any purpose in showing that?

Mr. Cashatt: Just to finish the day.

The Court: Isn't it enough to show that none arrived up until the time of the accident?

Mr. Cashatt: Well, that is the last one.

Q. Now, Mr. Williams, in your work what do you have to do with the salt cars when they arrive?

A. Well, when a salt car arrives in Yardley yard, the general practice is to consult the Addison Miller plant and see if they feel they have room in the salt house to unload a car of salt. Sometimes that salt will store up to the point that we have to hold the cars out [691] for several days in order to make room for it. The general thing is to call them and ask them if they have room in the salt house for the salt and, if they say they have, why then we start working on the yardmaster to get the car spotted.

Q. What do you mean "spotted?"

A. Spotted to the salt house so that it can be unloaded.

Q. Does that mean it has to be lined up with the door of the salt house? A. That's right.

Q. Now in your work as ice foreman, do you keep any record of salt cars that arrive, when they arrive and when they are unloaded?

A. Yes, we do.

The Court: You can offer just a page, if you wish, and then remove it later or substitute a copy, if you care to do that.

(Testimony of Gordon Williams.)

Mr. Cashatt: That is what I would like to do, your Honor, is offer the page.

The Court: Yes, just the page in the book.

Mr. Cashatt: Then I will substitute a copy.

The Clerk: I have marked Defendant's 39 for identification.

Q. (By Mr. Cashatt): Mr. Williams, handing you the book which has one page marked Defendant's Exhibit No. 39 [692] for identification, what is that book?

A. Well, that is the book that we keep our record of salt that we use and also the amount of cars that are ordered for the following year.

Q. And is that record kept day by day?

A. This record here is, shall we say, kept when needed. We don't have a car of salt every day.

Q. But what I mean, is it a running record, is it made in regular rotation?

A. That's right.

Q. I mean if a car of salt would come in or did come in on July 1, 1952, would that be entered in the book at the time it arrived?

A. Yes, it would.

Q. And would there also be an entry made at the time the car was unloaded, the date it was unloaded? A. There would be, yes.

Q. Now, referring to the sheet marked Defendant's Exhibit No. 39 for identification, without relating what is on it, tell us what that sheet is, just the period of time it covers, and so on.

A. Well, this sheet here is a record for the year

(Testimony of Gordon Williams.)

of 1952, and it covers all cars of salt that were brought in and unloaded at the Yardley ice dock.

Q. For the year of 1952? [693] A. Yes.

Mr. Cashatt: Offering Defendant's Exhibit No. 39.

Mr. Etter: You are offering this sheet with these two attached?

Mr. Cashatt: That is correct.

Mr. Etter: The back of this, too?

Mr. Cashatt: Well, the back we can blank it out.

Mr. Etter: Is that part of this exhibit or not?

Mr. Cashatt: No, just the front. See, that pertains to something else, we will just block that out.

Mr. Etter: May I inquire on voir dire a few minutes?

The Court: Yes.

Mr. Etter: The back of this apparently is not part of the exhibit, but the sheet marked has two attachments?

Mr. Cashatt: That is correct.

Voir Dire Examination

Q. (By Mr. Etter): Mr. Williams, so we will have an understanding of the exhibit, I note here you have salt ordered for 1952. Does this exhibit which has been identified by you purport to be the salt that you brought in or that was shipped into the N.P. yard despite anything that might appear here? A. Well, you see here—— [694]

Mr. McKevitt: Louder, please.

Mr. Etter: Speak up a little louder.

(Testimony of Gordon Williams.)

A. On December 20th of 1951 we placed our order for our salt for the following year of 1952.

Q. I see.

A. And we placed, as you will see, one car for January 15th.

Q. Well, that is, you placed these orders?

A. This order was placed.

Q. That order was placed?

A. Now this list here was made with the understanding that we had ordered this amount of cars and would receive them, and then he made a list here of when they were supposed to come in and, consequently, it shows each day that they arrived.

Q. I see.

The Court: You say "he" made a list?

A. The ice foreman, the day ice foreman.

The Court: I see.

Q. (By Mr. Etter): Did you make any of these entries? A. I probably have, yes.

Q. Which ones?

A. Right offhand, I can't see any that I have made.

Q. You can't see any that you have made?

A. No. [695]

Q. Who is it keeps this book, anyway?

A. The day ice foreman at Yardley keeps that book.

Q. The day ice foreman? A. Yes.

Q. And you have made no entries here?

A. Well, not that I can see or can recognize. I may have some dates in there.

(Testimony of Gordon Williams.)

Q. You don't know anything about salt arriving so far as this exhibit is concerned or as it indicates except by what it purports to show; isn't that correct?

A. No, we know when salt comes in by other various things from this.

Q. You didn't make any of these entries?

A. No, I don't have to make them entries.

Q. Well, do you know whether each one of these entries was made personally——

A. I do know that when salt comes in on my shift, I leave a note for him that it has arrived.

Q. No, but I mean can you testify to your personal knowledge as to the accuracy and authenticity of this exhibit? A. Would you say that again?

Q. Can you testify of your own personal knowledge as to the accuracy of this exhibit which has been presented here, this identification, and the authenticity and the [696] accuracy of the entries?

A. I would say that it is correct, yes.

Q. Can you testify of your personal knowledge about it?

A. That I kept it up? There is four men to keep that besides me.

Q. Yes, but you didn't make any of these entries, as I understand?

A. I wouldn't say that it was accurate because I don't know that point of it.

Q. You don't know that this is accurate or not?

A. I have no reason to disbelieve that it isn't accurate.

(Testimony of Gordon Williams.)

Mr. Cashatt: I might shorten this:

Q. Mr. Williams, who was the man who made this up? A. Mr. McCartney wrote that up.

Mr. Etter: Did he write them?

Mr. Cashatt: I won't waste any more time, I will bring the other man in.

The Court: I don't think we should spend any more time than that.

Q. (By Mr. Cashatt): Mr. Williams, how long did you say you worked out at Yardley?

A. I have worked out at Yardley since January of '42.

Q. And during that time when you were out there, were you ever on the Addison Miller ice dock? A. Many times. [697]

Q. Did you ever see any Addison Miller men carrying out any slush ice?

A. Not that I recall, no.

Q. Did you ever at any time see any Addison Miller men crawling under the couplers of box-cars or stock cars? A. Not that I recall, no.

Q. Did you ever see any Addison Miller men crawling under the couplers of stock cars or any other cars carrying slush ice?

A. No, sir, I have not.

Mr. Cashatt: You may examine.

Cross Examination

Q. (By Mr. Etter): As I understand it, Mr. Williams, the Northern Pacific has on duty 24 hours a day an ice foreman, is that the idea?

(Testimony of Gordon Williams.)

A. That's right, sir.

Q. And I think you said, too, that the ice foreman, depending on traffic, calls out all the help he needs in the form of assistant icemen, I guess you call them? A. That's right.

Q. Is that correct? A. Yes, sir.

Q. And I think you said that the instruction on the amount [698] of ice and salt that goes in, you have supervision over that for Northern Pacific?

A. Yes, sir, we do.

Q. Where do you exercise that supervision physically in the yards at Yardley? Where do you supervise this ice-loading operation? Where do you determine the amount of salt that is put into the Northern Pacific cars?

A. From the ice dock.

Q. From the ice dock? A. Yes, sir.

Q. So if there is an icing operation going on, you are right down on the ice dock, is that right?

A. The ice helpers are, yes.

Q. The ice helpers. You are not, is that it?

A. I am not, no, sir.

Q. You are not?

A. Not all the time. Sometimes, not all the time.

Q. You made periodic visits, too, do you not?

A. Sometimes, yes.

Q. I see. And these men, these icemen that you are talking about, are they under your direct supervision? A. The ice helpers?

Q. The ice helpers? A. Yes, sir. [699]

(Testimony of Gordon Williams.)

Q. And they are responsible to you?

A. Yes, sir.

Q. And you are responsible to the Northern Pacific? A. Yes, sir.

Q. Is that correct. And are these ice helpers engaged in their occupation on behalf of the Northern Pacific on the ice dock any time that cars are being iced by Addison Miller? A. Yes, sir.

Q. Any and all times? A. Yes, sir.

Q. One or more of them?

A. One or more, yes.

Q. One or more. And you at times yourself make these inspections? A. Yes, sir.

Q. The purpose being, of course, the icing of refrigerator cars for the Northern Pacific Railroad?

A. Yes, sir.

Q. Which it transports in interstate commerce and in intrastate commerce and all over the country? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now you indicated in your testimony concerning an [700] exhibit, Mr. Williams, and I refer now to Defendant's Exhibit No. 38, that you had marked here on your shift the number of cars or the reefers or refrigerator cars that came in or arrived, I gather, during your shift or tour of duty on the 17th day of July, 1952; is that correct?

A. Yes, sir.

Q. And I gather that that is the complete list of those cars that came in? A. Yes, sir.

Q. Is that right? A. Yes, sir.

(Testimony of Gordon Williams.)

Q. And there were also cars on your shift up until this accident at about 8:30 that left, you say, one train, I think? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now are these the only cars, Mr. Williams that you had anything to do with on your shift, that is, refrigerator cars?

A. Yes, sir, I believe that would be correct in saying yes to that question.

Q. In other words, these cars are the only refrigerator cars about which you have any knowledge on the 17th day [701] of July, 1952?

A. Yes, sir.

Q. Are there any other cars, refrigerator cars, that were processed or handled by any icemen working for you or under your supervision up until 8:30 on that evening other than these cars which appear upon this exhibit?

A. Well, sir, in order to answer that, I would have to look at the balance of the records. That is two years ago, I don't recall. This is the first I have saw of the record, I don't know, I would have to look.

Q. Well, then, these aren't the complete records of the refrigerator cars or all of the refrigerator cars that you or your men inspected or had supervision over, are they?

A. To my knowledge, yes, sir, they are.

Q. Well, to your knowledge, these are the cars that arrived, as I understand it?

A. That's right, sir.

(Testimony of Gordon Williams.)

Q. These arrived, and I am asking, did your icemen, to your knowledge, have any supervision or control over any other ice cars, refrigerator cars, other than those that appear upon that exhibit?

A. No, sir.

Mr. McKevitt: You mean on July 17th?

Mr. Etter: On July 17, 1952, prior to 8:30. [702]

A. No, sir.

Q. They did not? A. No, sir.

Q. Now it isn't your testimony, Mr. Williams, is it, that these cars, these refrigerator cars, which appear upon Defendant's Exhibit, I think it is 38, are the only refrigerator cars that were present in the whole Yardley yards on the 17th day of July, 1952, is it?

A. Let's not say that they are the only ones present; let's say that they are the only ones we serviced in that time.

Q. That is the only ones you serviced that came in, is that right? A. Yes, sir.

Q. All right, then, you will answer my question, you don't say, then, that these are the only refrigerator cars that were in the whole Yardley yards on the 17th of July, 1952?

A. No, sir, I wouldn't say that. There is many, many empties on the rip track, probably full of them.

Q. Full of them. Are there any empty refrigerator cars any place but on the rip track?

A. Could be all over the yard.

Q. Could be all over the yard?

(Testimony of Gordon Williams.)

A. Yes. But we don't have any primary interest in empty [703] cars.

Q. You don't have any primary interest in empty cars. Tracks 12 and 13, they are general purpose tracks, isn't that true?

A. That's right, sir.

Q. And are all these other tracks that you have referred to where refrigerator cars may be scattered around, are they general purpose tracks?

A. Yes, sir.

Q. They are. To your knowledge, you don't know whether there were any refrigerator cars that you didn't service or didn't know anything about there on general purpose tracks, including 12 or 13, you don't know whether that is a fact or not, do you?

A. I beg your pardon, sir?

Q. You don't know whether there were other refrigerator cars, other than these you have on this list that you have stated were scattered all over the yard, possibly, you don't know, do you, whether any of them were on Tracks 12 or 13?

A. Sir, I know that when the cars are put to the dock, that I service them, and I know that I have got a record of them because I have weigh bills to cover them.

Q. Well, I am not questioning you on that, sir, I am [704] asking you whether you knew whether these refrigerator cars that are scattered all over the yard are placed at any specific locality? Are you prepared to say that none of them were on 12 and 13 other than these cars that day, July 17th?

(Testimony of Gordon Williams.)

A. Yes, sir, I would say that they weren't on there.

Q. They were not on there? A. Yes, sir.

Q. And how is it that you know?

A. Because the train pulled out of Track 12 and left it clear.

Q. Left it clear? A. Yes.

Q. At what time? A. 7 p.m.

Q. No other cars were put in, is that it?

A. To my knowledge——

Q. Reefer cars? A. No.

Q. Or any other cars?

A. That is, until the train arrived that had to be iced?

Q. That had to be iced? A. Yes.

Q. What time was that?

A. What time did that train come? I can't recall. 9:35, [705] wasn't it?

Mr. McKevitt: Now counsel——

The Court: 9:35, he said.

Mr. Etter: 9:35.

Mr. Cashatt: I think he can look at the exhibit, if he wishes, your Honor.

Mr. Etter: All right.

Q. That train came in at 9:35 and the other train pulled out at six o'clock something. Do you want to look at it and find it?

A. The freight train left at 7 p.m., didn't it?

Q. The freight train left at 7 p.m., didn't it? I don't know, but you can probably find it here.

A. That's right, 7 p.m.

(Testimony of Gordon Williams.)

Q. 7 p.m. And you know that there weren't any cars on Tracks 12 or 13 until this train came in at 9:35?

Mr. McKevitt: Object to this as repetition, your Honor.

Mr. Etter: Just a minute, please.

Mr. McKevitt: Let me make an objection.

Mr. Etter: All right.

The Court: Overruled, he may answer.

A. To my knowledge, there was no cars to be serviced at that time, so I did not assume that there were any on the dock—or any on the tracks. [706]

Q. (By Mr. Etter): Do you know whether or not——

A. I know there was no cars to service.

Q. You weren't down there at that time, were you?

A. I don't have to be there, I know what is in the yard.

Q. Of course, I am not inquiring about what you have to do or anything else, I am inquiring whether you were there. Were you down at the dock between 7 and 9:35?

A. Yes, sir, I was.

Q. What time were you down there?

A. Shortly after the accident.

Q. Shortly after the accident. Were you down before the accident? A. No, sir.

Q. From 7 o'clock. Beg your pardon?

A. No, sir, I wasn't.

(Testimony of Gordon Williams.)

Q. I see. Then, you don't know whether any refrigerator cars were on 12 or 13, do you?

A. I know that there wasn't in the yard. If there wasn't any in the yard, where we are going to get them to put them there?

Q. Well, in other words, your testimony now is that after the train left, there were no refrigerator cars left in the yard?

A. To be serviced on Track 12, no.

Q. To be serviced, but is it your statement none of them [707] were left in the yard?

A. Sir, the city yard is full of reefers every day.

Q. Are you acquainted, Mr. Williams, with all of the switching movements; is that part of your duty, too? A. I would say I was, yes.

Q. You were. You are and were acquainted with all the switching movements on this evening in question, that is, July 17th?

A. I would say so.

Q. All right.

A. To the point of taking care of my own work, yes.

Q. That isn't what I asked. Do you know about all the switch movements in that yard that night?

A. No, sir, I don't think I do, no.

Q. You are acquainted with the ones that had to do with your icing of cars? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. All right, do you know anything about any switch movements of cars on Track 13 after the train left at 7 o'clock?

(Testimony of Gordon Williams.)

A. No, sir, I do not know of any reefers that could have been put there.

Q. Do you know of any cars that were put there? [708]

A. I know of cars that were put down there, yes.

Q. Do you know of them by reason of information secured since the accident, or did you know about them—— A. Yes, that is true.

Q. Or did you know about them at the time?

A. No, it was afterwards.

Q. Afterwards. How soon afterwards?

A. Well, knew they were there five minutes after the accident happened.

Q. Five minutes after the accident happened. So you knew they must have been there at the time it occurred; that is the reason that you know, is that true? A. That is true.

Q. I gather from your testimony that it is definite with you, Mr. Williams, that there were no cars iced after 7 o'clock and until after 9:35?

A. That's right.

Q. Is that correct? A. Correct.

Q. When you were down—were you down, Mr. Williams, at the icing dock prior to the departure of the train which left at 7 o'clock on the 17th?

A. No, sir, I wasn't.

Q. Beg your pardon?

A. No, sir, I wasn't. [709]

Q. Were you down when the train came in?

A. No, sir.

(Testimony of Gordon Williams.)

Q. Were you down during any part of the time that train was being iced? A. No, sir.

Q. I assume that the only time that you were down at the dock that night was following the accident? A. That's right, sir.

Q. What time did you arrive down at the dock, Mr. Williams, the night the accident occurred?

A. Well, sir, I can't be too specific in that. I was called by the Addison Miller foreman and advised that there had been an injury down there and told to call the ambulance, and I called the ambulance and then I rushed right down there. The time, I couldn't say, I don't know. It was sometime after 8 o'clock.

Q. I am not trying to hold you to the time. When you got down there, young Gerald Stintzi was subsequently taken away in an ambulance?

A. No, sir, he laid there quite awhile.

Q. Yes, but I mean subsequently, sometime after, he was taken away in an ambulance?

A. Yes, sir.

Q. Did you go on the ice dock then?

A. No, sir, I had no reason to go up there. [710]

Q. Or were you anywhere near the salt shed about that time?

A. The accident happened right near the salt shed.

Q. Right near the salt shed. What was going on at the salt shed, if you noticed?

A. There wasn't anything going on there that I noticed.

(Testimony of Gordon Williams.)

Q. Nothing going on? A. No.

Q. And there were no reefer cars there when you got down there? A. No, sir.

Q. No refrigerator cars either in the cars that had been spotted or in the cars that had been floated in?

A. No, sir, that I had seen, I did not see any, no.

Q. You didn't see any. Mr. Williams, I don't think that you have had an opportunity to see this exhibit before. It is the Plaintiff's Exhibit 16. Do you recognize the picture other than for the fact that it is half of the west end and half of the east end of the salt house? A. Yes, sir.

Q. And other than the fact of the taking of the picture and the projection of half one way and half the other, that is an accurate representation, is it, of the salt house?

A. I would say so, yes. [711]

Q. When you got there, I understand that you said that young Stintzi was somewhere near the salt house or around it. Could you indicate, if it is possible, on this exhibit where he was, or are you able to do that?

A. Well, I would say that he was farther down than this picture shows. That would be farther east.

Q. He was farther east than is indicated by the picture?

A. I would say so, that is my best guess.

Q. That is your best recollection, thank you.

Mr. Williams, I might ask you this: To your recollection or to your personal knowledge, has more

(Testimony of Gordon Williams.)

than one salt car been taken into the salt shed at a time?

A. Sir, there may have been two cars on Track 13 full of salt at one time, but you can only unload one at a time. That is, up until the time of this accident; that is what you want, isn't it?

Q. Yes. And I assume you have had situations, have you not, Mr. Williams, where the salt pit, so-called, or the salt shed or whatever they call it, has been filled to capacity where they wouldn't take a full carload; isn't that true?

A. That's right, sir.

Q. And during that time, the carload of salt is not unloaded on the same shift or at exactly the same time or immediately after it is taken in, isn't that right? [712]

A. Yes, sir, they can fill the salt house to capacity and then call and say that they can't get any more in, and then we would order the car to be spotted and held.

Q. I see. Is that always done, or sometimes is the car left there for the salt to be taken out as it may be used? For instance, if there was a fruit train being iced on the other track, on the other side on 12, and you had your salt car being unloaded on 13, do you in every instance where a car is not completely empty remove the car from 13?

A. Well, sir, the car would not be unloaded unless it was blue flagged, and I don't see how they could possibly do that if they were supposed to be icing on 12.

(Testimony of Gordon Williams.)

Q. Well, no, say they were icing on 12 and you had a salt car being unloaded on 13; if you couldn't unload it in one day, on occasions have you left the salt car there and continued the icing on Track 12, or do you have any recollection of any instance of that kind?

A. Well, to my knowledge, they wouldn't let us keep that track tied up that long. They generally use it for storing east loads and stuff and we wouldn't be able to keep it that long. We would have to order it held and then they would put it back to their convenience.

Q. What you say, then, you don't know, but it is unlikely; is that a fair appraisal of your statement? [713]

A. It is unlikely, that's right.

Q. Now, in any event, it is true, is it not, that all of the icing operations of Addison Miller are conducted and carried out under the direct supervision of your ice department?

A. That's right.

Q. When you got down there that night, you could see Mr. Stintzi, couldn't you?

A. Yes, sir.

Q. In other words, the overhead lights, that is, the white lights, were on, weren't they, on the dock?

A. Yes, sir.

Mr. Etter: That is all.

Redirect Examination

Q. (By Mr. Cashatt): Mr. Williams, does the

(Testimony of Gordon Williams.)

Northern Pacific in any way supervise the carrying out of slush ice at the Addison Miller dock?

A. No, sir, we do not.

Q. Does the Northern Pacific have anything whatsoever to do with that operation?

A. To my knowledge, they do not.

Q. Now, Mr. Williams, from what you have told us about what you know about the operation on things being [714] carried out on Tracks 12 and 13 on July 17, 1952, and your going down after the accident, do you know of your own personal knowledge whether or not there was any salt car being unloaded at the time this accident occurred?

A. There was no salt car being unloaded at that time, to my knowledge.

Mr. McKevitt: To your knowledge, you say?

A. Yes.

Q. (By Mr. Cashatt): When you went down there—by the way, Mr. Williams, what do they use between the boxcar and the dock to unload a salt car?

A. Well, I suppose you would term it as a plate. It sets between the car and the window of the salt house to truck the salt across.

Q. When you went down to the dock after the accident occurred, did you see any of those plates around? A. No, sir.

Q. Did you look for any? A. No, sir.

Q. I see.

Mr. Cashatt: That is all.

The Court: Any other questions of this witness?

(Testimony of Gordon Williams.)

Recross Examination

Q. (By Mr. Etter): I gathered you said you didn't look for any steel plate?

A. No, sir, there was more important things to take care of besides that.

Q. That's correct. Did you look for a salt car?

A. No, sir.

Q. Beg your pardon?

A. No, sir, I didn't.

Q. You didn't look for a salt car. By the way, am I right, does the Northern Pacific own the salt that is used? A. Yes, sir.

Q. They do. How about these picks and things they use up on top, do they own those, too?

A. No, sir, I don't believe they do.

Q. Do you know?

A. I would almost—well, I would be positive that they don't own them; I would say Addison Miller owns the picaroons.

Q. Owns the picaroons.

Mr. Etter: All right, that is all.

Mr. Cashatt: That is all.

The Court: Court will recess for 10 minutes.

(Witness excused.)

((Whereupon, a short recess was taken.)

Mr. Cashatt: Mr. Woolf.

LLOYD WRIGHT WOOLF

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Just state your full name, please? A. Lloyd Wright Woolf.

Q. And where do you reside, Mr. Woolf?

A. 4525 North Calvin, Trentwood.

Q. And that is out in the Spokane Valley, is it?

A. Yes.

Q. How long have you lived in Spokane?

A. About five and a half years.

Q. Married man? A. Yes, sir.

Q. Family? A. Yes, sir.

Q. By whom are you employed?

A. Northern Pacific Railroad.

Q. And how long have you worked for the Northern Pacific [717] Railway?

A. Since about August 11th, I think, 1951.

Q. 1951? A. Yes.

Mr. McKevitt: Speak up, please, won't you?

Mr. Cashatt: So that everybody can hear, please.

Q. And what has been your work with the Northern Pacific Railway since then?

A. Ice helper.

Q. And as an ice helper, Mr. Woolf, what are your duties?

A. The ice foreman gives me the information regarding what is required on the refrigerator cars, service required, and I am kind of his leg man, I go out and do the work.

(Testimony of Lloyd Wright Woolf.)

Q. And do you actually go to the ice dock?

A. Yes, sir.

Q. And that is the Addison Miller dock, is it?

A. Yes, sir.

Q. Out at Yardley? A. Yes, sir.

Q. Your work with Northern Pacific, has that been in the yards at Yardley?

A. Beg your pardon, sir?

Q. Your work with Northern Pacific, has that been in the yards out there at Parkwater? [718]

A. Yes, sir.

Q. And now on July 17, 1952, did you work that day? A. Yes, sir.

Q. And what time did you come to work on July 17, 1952?

A. I don't recall the exact time, sir, but I suppose it would have been before the fruit train arrived by at least half an hour. That was the practice.

Q. Had you been notified that the fruit train would arrive?

A. Well, yes, that is why I was called out.

Q. Oh, you were called to come in and work while the fruit train was there, is that right?

A. Yes, sir.

Q. And you say you probably arrived there half an hour before the fruit train?

A. I don't recall the exact time, sir.

Q. The evidence in the case, Mr. Woolf, is that the fruit train No. 5112 arrived at 4 p.m. on July

(Testimony of Lloyd Wright Woolf.)

17, 1952, and was that the train that you recall you were to come down when it arrived?

A. Yes, sir.

Q. What did you do after arriving at the yards?

A. Well, I would—the standard practice is to go into the——

Q. What did you do that particular day? [719]

A. Well, I want in, as usual, and made out a list and took the foreman's instruction regarding each car, telling me how much salt and what percentage of salt should go in the cars by weight with the ice.

Q. In refrigerator cars? A. Yes, sir.

Q. And then after getting your list, did you go to the Addison Miller dock? A. Yes, sir.

Q. Were you there when the fruit train arrived?

A. Yes, sir.

Q. And on what tracks was it spotted?

A. 12, I believe, it came in on.

Q. And was some of it put on 13?

A. Im not positive about that, I can't remember that for sure, but it was the practice to break it in two and shove back part on 13.

Q. Was it a good-sized fruit train?

A. Yes, sir, that is a fair sized.

Q. And now when you are down there as an ice helper, do you instruct the Addison Miller employees in any way as to how to do their work?

A. No, sir. I instruct, inasmuch as I bring on the cars, how much salt should go in with the ice, whether it be coarse, chunk or crushed ice. [720]

(Testimony of Lloyd Wright Woolf.)

Q. Do you tell them how to put the ice in or how to put the salt in, the actual operation of doing it?

A. No, I don't instruct the men.

Q. And then how long after going down to the dock, how long did you stay there?

A. Until after the fruit train was finished.

Q. Do you know what time it was finished, approximately? A. Well, roughly around 6.

Q. And then what did you do after the fruit train was iced?

A. I take my information back up to the foreman, because he has got to write all that stuff down on his 1755 form.

Q. And was there ony other ice helper with you on that particular day?

A. Yes, there was.

Q. What was his name?

A. Lester Greenwald.

Q. Do you know where he is at the present time?

A. I believe he is in the service, sir.

Q. And now how did you notify the ice foreman that the work was completed, if you did?

A. By telephone.

Q. On what phone? A. Well, on the dock.

Q. You mean the Addison Miller dock? [721]

A. Yes, sir.

Q. And on July 17, 1952, did you call Mr. Williams, the ice foreman, after this train was iced?

(Testimony of Lloyd Wright Woolf.)

A. I imagine I did, sir. I always did on the fruit trains, that was the standard practice.

Q. And then what did you do after that?

A. I took the information up to the foreman.

Q. You took it up to him up at the yard office, is that right? A. Yes.

Q. And at the time you left, was the fruit train still on the tracks at the time you left the dock?

A. Well, yes, sir.

Q. And did you at any time later than evening go back to the Addison Miller dock?

A. Yes, I did.

Q. About what time was that?

A. That was just a few minutes after the accident had happened.

Q. And at any time when you were around the Addison Miller dock before you left, did you see any salt car on Track 13 that was being unloaded?

A. No, sir, I don't recall seeing any.

Mr. Cashatt: You may inquire. [722]

Cross Examination

Q. (By Mr. Gillivray): Mr. Woolf, as I understand, in the performance of your duties you get your instructions from the ice foreman as to what is required in the icing of cars, then you go down to the dock to see that those instructions are carried out? A. Yes, I go down.

Q. That is correct, isn't it? And usually do two of you ice helpers go down to the dock at one time?

A. On fruit trains, yes, sir.

(Testimony of Lloyd Wright Woolf.)

Q. On fruit trains. As I understand this reefer business, Mr. Woolf, sometimes you have a train composed completely of reefers, but other times you might have a train with three or four reefers and boxcars and cattle cars and other types of cars; is that correct? A. Yes, sir.

Q. So on occasions, you will ice a whole train; on other occasions, you might ice one, two or three cars? A. That's right, sir.

Q. When just one car is being iced, does an ice helper go down and check to see that it is properly iced?

A. Yes, sir, we go down to see that the ice and salt is put in, and we also have to poke the drainage to see that the water can escape when it melts.

Q. Now in icing a car, when do you put the salt in? After all the ice is in?

A. It depends, sir, on the amount of ice to be put in.

Q. Well, who determines when the salt is to be put in when it is half full or when it is completely full of ice?

A. Addison Miller have the instructions.

Q. And who gives them those instructions?

A. I think they get them from a Northern Pacific rule book.

Q. Is that the same rule book we have been hearing about? A. I don't know.

Q. Or do you know?

A. I don't know what you have been hearing about.

(Testimony of Lloyd Wright Woolf.)

Q. And you are familiar with how different cars should be iced in different fashions?

A. Yes, I am.

Q. And as a representative of Northern Pacific down on that ice dock, if you saw the crew of Addison Miller icing a car contrary to the manner provided in the rule book, you would immediately stop that procedure?

A. I would tell the foreman.

Q. You would tell him to do it according to the rule? A. Yes.

Q. In other words, you, under the arrangement between [724] Northern Pacific and Addison Miller, had the authority, as an ice helper under the supervision of your ice foreman, to exercise control over how those cars were iced, to see that they were properly iced? A. Well, yes.

Q. Yes. And from time to time, you did exercise that direct control over those operations?

A. I would tell the foreman, yes.

Q. Yes. When anything was going on that you thought was wrong, you would stop it and tell them what to do?

A. I would tell the foreman what to do, yes.

Q. And you have done that? A. Yes.

Q. And, Mr. Woolf, if, let's say, the ice chain bringing up the ice from the tunnel to the top of the dock became clogged because the slush pit was overloaded and overflowing, you, as an ice helper, would immediately give orders that that ice slush pit be cleaned out? A. No, sir, I would not.

(Testimony of Lloyd Wright Woolf.)

Q. You wouldn't?

A. No. That doesn't mean anything to me.

Q. Pardon?

A. That doesn't mean a thing to me, that chain.

Q. Well, doesn't it mean a thing to you as a representative of the Northern Pacific to see that ice continually [725] comes through that tunnel and up on to that dock when you have a fruit train there being iced?

A. That is Addison Miller's job, sir.

Q. Well, and what if the chain became clogged up because the ice pit was overflowing, would you do anything about it?

A. No, sir, I wouldn't.

Q. You wouldn't. What is that?

A. Because it is not my job.

Q. It is not your job. But over all of the other icing operations, you did have authority to and did exercise control and supervision?

Mr. Cashatt: I object to that, the broad term "control and supervision." I think it should be more specific.

Mr. MacGillivray: I think he understands.

The Court: Well, I will overrule the objection.

Mr. MacGillivray: Plain words.

The Court: Can you answer that?

Mr. MacGillivray: Read the question.

A. What was that again?

(The question was read.)

A. No, sir, I wouldn't say yes to that, because all other, no.

(Testimony of Lloyd Wright Woolf.)

Q. Pardon?

A. No, sir, not all other. [726]

Q. Over what part of the icing operations did you exercise direct control and supervision?

A. I only controlled the amount of salt they put in, how large of chunks of ice they put in. Other than that, I didn't.

Q. Assuming that you had a fruit train in there in need of immediate icing and the chain leading through the tunnel stopped; wouldn't you call your ice foreman?

Mr. Cashatt: I object to that as repetition, your Honor. He has answered the question twice already. It is assuming something that is not in evidence in this case.

The Court: Well, overruled.

Mr. Cashatt: It isn't shown it ever clogged.

The Court: You may answer that question.

A. What was that?

Q. (By Mr. MacGillivray): Assuming, Mr. Woolf, that you had a fruit train standing by on 12 and 13 and it needed immediate icing, as you did on the early evening of July 17, 1952, and the chain bringing up ice clogged and no more ice was coming to the top of the dock; would you not call your ice foreman at the Northern Pacific and report that to him?

A. If there was going to be considerable delay or something, I may phone him up to let him know what was the delay. [727]

Q. And if your foreman then gave you some in-

(Testimony of Lloyd Wright Woolf.)

structions, you would carry them out, would you not?

Mr. Cashatt: I object to that, your Honor.

The Court: Well, I will sustain the objection.

Mr. Cashatt: Assuming things.

Q. (By Mr. MacGillivray): Mr. Woolf, you say you went back to the ice dock right after the accident occurred? A. Yes, I did.

Q. Do you remember what time that was?

A. Well, it was roughly around 8 o'clock. I couldn't say for sure.

Q. Wasn't it closer to 9 o'clock?

A. No, it was closer to 8.

Q. Well, it was dark outside, anyway, wasn't it?

A. No, it wasn't dark.

Q. It wasn't dark. Did you see young Gerry Stintzi on the ground down there?

A. Yes, sir.

Q. And did you go up on top of the dock?

A. Yes, sir.

Q. And the white overhead lights on top of the dock were illuminated?

A. I don't recall now whether they were or not.

Q. You don't recall. Did you notice whether this metal plate that was used between a salt car and the salt pit [728] was laying on the ground immediately outside the salt pit?

A. I didn't see one.

Q. Did you look for it?

A. I had no reason to look for it, I didn't.

(Testimony of Lloyd Wright Woolf.)

Q. When you returned, did you look to see whether or not any salt car was there?

A. No, I had no reason to look for one.

Q. This fruit train that you iced, was that down on both 12 and 13? A. Beg your pardon?

Q. The fruit train that you iced between 4 o'clock and 6:10, did you ice both on 12 and 13?

A. I don't recall for sure whether it was on 12 and 13, but it was the general practice.

Q. Pardon?

A. It was the general practice to ice on both tracks.

Q. You don't remember whether it was on 13?

A. On that particular train, I do not remember for sure.

Q. Do you remember what cars were on 13 when you were down there in the icing operation?

A. I don't recall any particular cars.

Q. And did you pay any particular attention to what cars were on 13 when you arrived down there after the accident? [729]

A. I did notice and recall that there were some stock cars when I came back after the accident.

Q. Any other type cars?

A. I don't recall seeing any other, but there may have been there.

Q. How many cars were there?

A. I didn't count them.

Q. Well, the 14 cars to the west when you arrived down there after the accident were not stock cars, were they?

(Testimony of Lloyd Wright Woolf.)

A. I don't know what they were. I saw some stock cars, but I don't know what cars.

Q. Where were the stock cars you are talking about? A. On 13.

Q. Were they to the west of the dock or east of the dock, or just where?

A. Well, along—I believe they were alongside of the salt house there.

Q. And you don't recall the first 14 cars that you passed by in running down there?

A. I didn't come that way, sir, I came through the tunnel.

Q. You came through the tunnel. And then did you go back to the yard office?

A. I stayed there until the boy was taken away.

Q. And then did you go back to the yard office?

A. Yes, I think so.

Q. Back through the tunnel or along the track?

A. I believe I went back through the tunnel, sir.

Q. I see.

Mr. MacGillivray: That is all.

Mr. Cashatt: That is all, Mr. Woolf.

The Court: That is all, then.

(Witness excused.)

Mr. Cashatt: Mr. Miller.

SAM MILLER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): State your name, please.

A. Sam Miller.

Q. And where do you reside, Mr. Miller?

A. 621 South Division.

Q. How long have you lived in Spokane?

A. Well, it will be 38 years in October.

Q. And what is your occupation?

A. Assistant general yardmaster, days.

Q. Is that for Northern Pacific? [731]

A. For the Northern Pacific Railway.

Q. What time do you go to work in the morning?

A. Well, I generally get out there at 6:30; I take over charge of the yard at 7 o'clock.

Q. And how long do you work?

A. On this particular job?

Q. Yes? A. Oh, since about 1938.

Q. And you say you go to work about 7 in the morning and what time do you go off in the afternoon? A. 3 o'clock, 3 p.m.

Q. And on July 17, 1952, Mr. Miller, did you work that shift that day? A. Yes, I did.

Q. And did you go off shift at 3 o'clock?

A. Yes, I did.

Q. Now, Mr. Miller, when you go off shift, do you leave any record of the cars on certain tracks

(Testimony of Sam Miller.)

for the other yardmaster that will come on as soon as you leave? A. Yes.

Q. And is that a daily record that is made every day at the end of each shift? A. Yes.

Q. And was such a record made on July 17, 1952? A. Yes. [732]

Mr. Cashatt: May I ask the witness which page is his writing? That is the one I want to mark.

The Court: Yes, all right.

Q. (By Mr. Cashatt): Mr. Miller, which is your writing that you leave at 3 o'clock?

A. This is mine (indicating). My assistant headed it up, but I filled it out.

The Clerk: I have marked Defendant's 40 for identification.

Q. (By Mr. Cashatt): Mr. Miller, handing you a book with one sheet marked Defendant's Exhibit No. 40 for identification, what is the book that you are now looking at with that page marked?

A. Well, that is the book that each yardmaster that changes shift makes a turnover to the assistant general yardmaster relieving him so as he will know what each track, or the cars that consist on each track, or if the track is clear or if it carries certain cars.

Q. Now looking at the sheet marked Defendant's Exhibit 40 for identification in that book, which is sheet number 6, did you make that sheet up on July 17, 1952 at 3 p.m.?

A. As I stated, my assistant headed it up and

(Testimony of Sam Miller.)

I filled in the places that are filled in here. I left this one open because there wasn't—— [733]

Q. Don't testify off of it, sir.

A. Oh.

Q. That is fine. And does the sheet No. 6 have a notation for Track No. 13, without saying what it is? A. Yes.

Q. Does it have that notation?

A. Yes.

Mr. Cashatt: Offering Exhibit No. 40.

Voir Dire Examination

Q. (By Mr. MacGillivray): Mr. Miller, this entry, the page marked as Defendant's Exhibit 40, was made out by you sometime prior to 3 o'clock on July 17, 1952?

A. That was made out probably 10 minutes before I went off shift.

Q. And that would show what cars might have been on Tracks 1, 6, 10, 12 or 13 as of 3 o'clock?

A. That is correct.

Q. You don't know what changes were made on Track 13 from 3 o'clock to 4 o'clock?

A. No, I leave there at 3 o'clock.

Q. You don't know what was on there at 4 o'clock? A. No.

Q. At 8 o'clock? A. No. [734]

Q. Or at 8:30? A. No, sir.

Mr. MacGillivray: Object to the exhibit as having no materiality, your Honor.

Mr. Cashatt: Well, your Honor, we want to bring

(Testimony of Sam Miller.)

it up to 3 o'clock, and then the next man will take it on, because Mr. Miller wasn't there, he didn't write the next shift.

The Court: Well, I will admit the exhibit showing the condition at 3 o'clock, it is understood.

Mr. Cashatt: Then, with the understanding, your Honor, that we can take the sheet out and substitute a photostat?

The Court: Yes, you may. As I understand it, only the one sheet has been offered, and then you may substitute copies.

Mr. Cashatt: That's right.

(Whereupon, the said sheet was admitted in evidence as Defendant's Exhibit No. 40.)

Q. (By Mr. Cashatt): Mr. Miller, on your list, Exhibit No. 40, made up about 10 minutes to 3 on July 17, 1952, I [735] see you start with Track 1 and go on down the list. Do you have a notation for Track 13? A. Yes, I have a notation here.

Q. And what is your notation for Track 13?

A. "Icers for 661 & City."

Mr. MacGillivray: I didn't hear that?

Mr. Cashatt: Say it again.

A. "Icers for 661 & City."

The Court: Might have him tell what that is in English.

A. Well, 661 is the number of a train.

The Court: All right.

Q. (By Mr. Cashatt): And "icers," what are "icers?"

A. Those are cars that are placed at the ice dock

(Testimony of Sam Miller.)

to either be re-iced or serviced for movement out of the yard.

Q. And is there any notation there of any salt car being on Track 13 at 10 minutes to 3 on that day?

A. No, sir, or it would have been shown there.

Q. Now showing you Exhibit No. 38, Mr. Miller, do the icers that you have listed—I see this exhibit starts at 3:45 p.m.—the icers that you had listed at 3 o'clock, are there any of those shown on Exhibit No. 38?

A. Well, here is one right here (indicating) because it says stop at Lewiston, and that goes out on this 661 [736] train.

Q. So, then, your Exhibit No. 40 corresponds with Exhibit No. 38, is that right?

A. That is right.

Mr. Cashatt: You may inquire.

Cross Examination

Q. (By MacGillivray): Mr. Miller, I didn't get clear what was on Track 13 at 10 minutes to 3?

A. "Icers for 661"—that is what we call the Lewiston train, that is the number of the train—"& City," which was probably shoved down there, if I can explain to you why the city was shoved in there.

Q. Yes.

A. This train probably come in from the east or west with this icer for Lewiston and there might have been a city load next to it. To eliminate two

(Testimony of Sam Miller.)

switches, we shoved the both of them down on Track 13 until they would ice this car.

Q. Well, an icer is a reefer car, though?

A. That is a refrigerator standing, traveling, under refrigeration.

Q. And how many reefer cars were on Track 13 at 10 minutes to 3? [737]

A. Well, I don't recall right at the present time because that is a long time away. There might have been—the way I got it there, "Icers for 661," there might have been one or two icers.

Q. You don't keep any check of how many icers or refrigerators cars are on the track?

A. When the checker comes in at 3:15, a complete check of the yard brought in at 3:15 each afternoon. Well, there is one brought in at 7:15 in the morning, one at 3:15, and one at 11:15. When the checker would come in at 3:15 in the afternoon, he would bring a complete check of all cars on Track 13 at that time.

Q. I see. And then you, of course, don't know what went onto 13 after 3 o'clock?

A. No, I don't.

Q. You don't know whether any salt car was moved in there at 4 o'clock or at 6 o'clock or at 7 o'clock?

A. No, I don't, because I went home at 3.

Q. The only place they put the salt cars is on Track 13, isn't it?

A. No, we have salt cars in storage down in what we call the backyard, and we have them on

(Testimony of Sam Miller.)

what we call Track 9, and when the ice foreman will issue me an order and lay it on my desk and say spot car such and such at ice dock, salt car for unloading, if the track is in such a [738] condition that we can spot it, we will spot it. If not, we will just tell them that we will have to wait until we clear the track so we can spot the car so the track can be blue flagged and the engine foreman notified.

Q. And sometimes you will spot a salt car on Track 13, it will be partially unloaded, and then you move it for one reason or another before it is completely unloaded?

A. If the car is not completely unloaded, the ice foreman will tell us. We then remove the car and place it at a convenient track in the yard, which is No. 9, so we can use the track, and then when the opportunity permits again, we put it back there for them to finish unloading.

Q. In other words, a salt car might be in and out of the salt mine location on Track 13 two, three or four times?

A. Not over twice, two times.

Q. Not over twice, not over what?

A. Two times, twice.

Q. Not over two times. Well, it might be in there and out and back again before it is completely unloaded? A. That is correct.

Q. And the only place you do unload salt cars is on Track 13? [739]

A. That is correct.

(Testimony of Sam Miller.)

Q. Do your records show whether there was a salt car on Track 13 on July 16, 1952?

A. Well, let's see, the 16th, July the 16th, let's see. One car of salt on the 16th, that is on the 16th, one car of salt.

Q. And that was at 3 o'clock?

A. Well, now, let me get this straight here. That would be at 3 p.m., yes.

Q. At 3 p.m.?

A. There is the time up here (indicating).

Q. And your records don't show whether that car was completely unloaded on the 16th before it was moved?

A. Well, it wasn't there in the morning of the 17th when I came to work.

Q. Well, but you don't know whether it had been complete unloaded on the 16th?

A. Oh, no, I don't know.

Q. In short, was that a full car of salt?

A. Well, I presume it was, yes. I am just guessing that it was a full car of salt. It might have been a partial car to finish unloading.

Q. Do you know how many sacks of salt a freight car holds?

A. No, I don't, I really don't.

Q. And it is entirely possible, is it not, that the salt [740] car that was there on July 16th was not completely unloaded and was moved back sometime on the 17th?

A. Well, there would be something in the book showing here on my turnover of the 17th that the

(Testimony of Sam Miller.)

car was replaced, or on the morning it would show here at 7 a.m. that the car had been placed back to finish unloading on 13. Now here is what he says, "City icers," in the morning.

Q. Yes.

A. All right, cars being iced to go downtown. All right, there is no indication that there is salt in there at this time. That is one thing——

Q. That is as of what time, 7 o'clock in the morning?

A. That is 7 o'clock. That is one thing we are very particular about is those salt cars, because we have got to protect those men while they are—what I mean by that, everybody is notified, including the engine foreman, that they are unloading salt on Track 13, and that is instructions that is specifically put out for us to notify all foremen so there would be no cars kicked in on that track.

Q. Those precautions are taken, is that true?

A. Those precautions are taken and have been taken.

Q. Yes. Then on the 17th, where you show icers on Track 13 at 3 o'clock, does that mean that those icers had been there from when you came on duty at 7 o'clock [741] until 3 o'clock?

A. Oh, no, those icers that shows in the morning shift here were removed by some engine and taken down to Erie Street, and these were new cars replaced anywheres from 9 o'clock in the morning until up until I went home.

Q. Well, do you know what other cars, other

(Testimony of Sam Miller.)

than these icers for Lewiston, had been on Track 13 between 7 o'clock and 3 o'clock?

A. Oh, I don't recall that. I might have built a train up in there in the meantime.

Q. And there might have been salt cars in there in the meantime?

A. No, there wouldn't be salt cars in there if I built a train in there.

Q. If you at any time didn't have a train in there, there might have been salt cars?

A. If there were, they would show on the turnover when I left at 3 o'clock.

Q. Not unless they were still there at 3 o'clock?

A. If they were still there at 3 o'clock, they should show there.

Q. If they weren't still there at 3 o'clock, or having been moved, it wouldn't show on this record? A. It wouldn't show on there.

Q. The only thing this record shows, Mr. Miller, is what [742] was there at 3 o'clock and not what had been there during the day?

A. That is correct.

Mr. MacGillivray: That is all.

The Court: Any other questions?

Mr. Cashatt: That is all, Mr. Miller.

(Witness excused.)

Call Mr. Craig.

BOYD Q. CRAIG

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name is Boyd Craig? A. Yes, sir.

Q. And where do you reside, Mr. Craig?

A. North 2714 Perry Street.

Q. How long have you lived in Spokane?

A. About 42 years.

Q. And married? A. Yes, sir.

Q. Family? A. Yes, sir.

Q. By whom are you employed? [743]

A. The Northern Pacific Railroad.

Q. And how long have you been employed by the Northern Pacific Railroad?

A. Since January 15, 1945.

Q. In July, 1952, were you working at the Yardley yards of the Northern Pacific at that time?

A. Yes, sir.

Q. And what was the nature of your job at that time? A. Switching.

Q. What time, Mr. Craig, did you come to work that day?

A. Well, I started to work at 3:15. It was probably about 3 o'clock that I got to work.

Q. And then did you work the 3 to 11 shift?

A. From 3:15 until 11:15, yes, sir.

Q. Do you recall, Mr. Craig, between, oh, say, 3 o'clock and 7, what you were doing out there?

A. Well, not particularly, just working around

(Testimony of Boyd Q. Craig.)

the yard switching one set of cars or another. We were working at all times.

Q. How was the activity in the yard during that particular day?

A. Well, I don't recall particularly. When we were out there, we are usually hitting the ball all day along or the whole shift.

Q. And by that, do you mean moving cars continually, making [744] up trains, breaking up trains, and so on? A. Yes.

Q. Now were you a member of a crew of which Mr. Prophet was the switch foreman?

A. Yes, sir.

Q. And who else were members of that crew?

A. There was Prophet was the foreman, and Johnny Morton was the man following the engine, and I was working the field.

Q. When you say the man following the engine, what do you mean?

A. Well, he is the man that lines the switches ahead for the engine, and then after that is all done, why he works towards the engine from the foreman. He is the one that pulls the pins on the cars.

Q. And you say you were the field man?

A. Yes, sir.

Q. What is the field man?

A. Well, the field man is the man that lines the switches, each switch for each individual cut or each individual car is going to. You work away from the train from the foreman.

(Testimony of Boyd Q. Craig.)

Q. And when you say you work away from the train, what do you mean by that?

A. Well, away from the cut of cars. The foreman, he is [745] usually at the end of the cut of cars, where he instructs the engine follower as to how many cars is going to be cut off, and, of course, I am down below that and I am the one that throws the switches where these cars are supposed to go.

Q. Now when you are working on a switch crew out there, where do you get your orders as to what cars to move around in the yard?

A. From the yardmaster on duty.

Q. And then the crew carries out the orders given you, is that right? A. Yes, sir.

Q. Now do you remember, Mr. Craig, of receiving some orders to pick up 14 cars on Track No. 43?

A. Yes, I do.

Q. And about what time would you say you received those orders?

A. Well, I would say it was, oh, possibly 7:30 or 7:45.

Q. And then did you go over and get those cars?

A. Well, Mr. Prophet, he went down and got the cars and I stayed up beyond the switch where he went in, the 42 Switch, I stayed up beyond that. The cars were set in there.

Q. A little louder, please?

A. The cars were all in there altogether, and he just [746] backed in with the engine and coupled onto them and started pulling them out.

(Testimony of Boyd Q. Craig.)

Q. And then where did you take the cars?

A. Well, coming out of 42, you go onto a track that is the outbound track from the round house for engines coming out of the round house come up and then onto the Old Main.

Q. Would it help any if you show us that over here?

Mr. Cashatt: I just wonder, can the jury see this at all down here? I hate to take the time to put it up.

Q. Mr. Craig, step over on this side, please, so you won't be in the way.

Mr. Craig, I don't believe you have seen this exhibit, Defendant's Exhibit No. 1. A. No.

Q. Please take a look at it and kind of get it in mind. The yard office is located on the west end, and the evidence is that the red line running down here (indicating) goes onto Track 13. Do you recognize that? A. I recognize that.

Q. And some notations of Tracks 42 and 43 up above toward the northern part of the map, see that all right? I might ask, Mr. Craig, do you understand that? A. Yes, I do.

Q. Do you know your directions? [747]

A. Yes, this is west, this is east, this is north, and down is south (indicating).

Q. That is fine. Keep your voice up, please, so that everyone can hear.

Now you say that you got the cars on Track 43 and pulled them over to the Old Main, is that right?

(Testimony of Boyd Q. Craig.)

A. Yes, here is Track 43 (indicating), got them here, come out here onto this outbound.

Q. Louder.

A. The outbound round house lead, up through here, and straight along this way and out in here onto the Old Main. This is the Old Main (indicating).

Q. All right, keep your voice up. What portion of the Old Main is designated in red there? Will you point that out?

A. The Old Main would be right along in here (indicating). That would be part of the Old Main, I imagine, but this here, my understanding, along in here, that is the working lead.

Q. And on the map, can you see the location of Switch 13? Do you see that?

A. That would be the switch right there (indicating).

Q. And please keep your voice up, Mr. Craig, so all the jurors and his Honor can hear you.

A. I'm sorry. [748]

Mr. McKevitt: That has never been marked on the map, has it, Switch 13?

Mr. Cashatt: It has, I believe, yes.

Mr. McKevitt: All right.

Q. (By Mr. Cashatt): Now, Mr. Craig, when Mr. Prophet picked up the cars, as you said, on Track 43, what was your course from the time those cars were coupled to the switch engine? Just trace where you went after that.

A. Well, I was out approximately about here

(Testimony of Boyd Q. Craig.)

(indicating), and when you come out of this switch for 42 and 43, this is a round house lead, that switch has always to be lined behind so the engines coming out of the round house couldn't go through it. So I stayed here to see whether Prophet lined the switch when he come out. If he hadn't of, why I would have went down to line the switch back to the round house lead again. And, of course, when the cars come out here and Prophet had lined that switch back, when he tied into these cars on 43 and started out with them, he cut across and lined 13 Switch. He had gone to 13 Switch, then he went back. When the last car come out 43 here, well, he got on to it and he dropped off there to line the switch and then again caught the cars again and went up here to the Old Main. And I had stayed approximately [749] right here at this switch here where you can glance down the Track 13.

Q. And did you see Mr. Prophet line Switch 13?

A. Yes, I did.

Q. And then where did you stay after Mr. Prophet lined Switch 13?

A. I was right over here where I could look down 13 Track.

Q. And from where you were standing, Mr. Craig, did you have a clear, unobstructed view down Track 13 to the east? A. Yes, sir, I did.

Q. From where you were standing, could you see the Addison Miller dock?

A. Yes, sir.

Q. When this movement started, did you know

(Testimony of Boyd Q. Craig.)

on what track the 14 cars were going to be put in on?

A. They were going to be put in on 13, yes, I understood that.

Q. And from the time that this movement started, tell us what attention you paid to Track 13, if any, before Prophet threw the switch on for Track 13?

A. Would you state that again, please?

Q. While you were in the area that you have told us, before Mr. Prophet moved Switch 13, did you look down [750] Track 13 at the Addison Miller ice dock? A. Yes, sir, I did.

Q. At that time did you see any blue light on Track 13? A. No, sir.

Q. At the Addison Miller ice dock?

A. No, sir.

Q. At the time Mr. Prophet turned Switch 13, did you look at the Addison Miller ice dock at that time? A. Yes, sir, I did.

Q. And what were you looking for?

A. Looking for a blue light.

Q. Did you see one?

A. Never saw one, no, sir.

Q. Did you see any blue light on Track 12?

A. No, sir.

Q. And then did you remain in a position where you could observe the Addison Miller dock after Prophet had turned the switch?

A. Yes, I did.

Q. Now how long, Mr. Craig, was it between

(Testimony of Boyd Q. Craig.)

the time that Mr. Prophet moved Switch 13 until the cars were actually set in motion down Track 13?

A. Well, offhand I wouldn't say directly, but I would imagine it would have been about three minutes to pull those cars up and throw this switch so they could go [751] down the main.

Q. Were you tied up by anything else while you were making this switch that you recall?

A. Not that I recall.

Q. And did you keep a continuous lookout toward the Addison Miller dock at all times before the cars, the 14 cars, started going down Track 13?

A. Yes, sir.

Q. And at any time during that period of time, did you see any blue light on either Track 13 or Track 12 at the Addison Miller dock?

A. No, sir.

Q. Now, then, did the 14 cars go on past you to the east? A. Yes, they did, down this lead.

Q. And at that time, Mr. Craig, when was the last you saw of those cars?

A. Well, after they had gone around past the switch here and headed toward 13.

Q. Was that after they had uncoupled the cars from the engine? A. Yes, sir.

Q. And when they were crossing Switch 13 and going down Track 13? A. Yes, sir.

Q. Were you in a position, Mr. Craig, while those cars were [752] going across Switch 13 and down Track 13 that you could have stopped those cars if you had seen a blue light at any time?

(Testimony of Boyd Q. Craig.)

A. Yes, sir, while they was going past me, I could have, and I believe I could have caught them if I had to later on.

Q. Just be seated.

Mr. Craig, if any blue light had been observed by you while those cars were going to the east, how would you have stopped them?

A. By climbing aboard the cars and tying down a hand brake, applying a hand brake.

Q. What do you mean by that, "tying down the hand brake?"

A. Well, on the end of each car there is a large wheel, that by turning the wheel it applies the brakes on the car.

Q. Then what did you do, Mr. Craig, after these cars were switched on Track 13?

A. I went to the yard office and we went to lunch. We tied up for lunch.

Q. And what time did you return?

A. It was about, oh, 8:35, I imagine.

Q. And was it then when you heard of the accident? A. Yes.

Q. Now was it customary during the time that you worked in [753] the yard, Mr. Craig, that switches of cars on Track 13 were made in the same manner as the one you have just told us about on July 17, 1952?

A. Would you state that again, please?

Q. While you worked in the yard before this day, July 17, 1952, had you made other switches on Tracks 12 and 13 in the same manner as you made

(Testimony of Boyd Q. Craig.)

this switch you have just told us about on the evening of July 17, 1952?

A. Yes, sir, if there wasn't a blue light on the track, we operated that way all the time.

Q. Did you ever make a switch like that when there was a blue light on either Track 13 or Track 12? A. Absolutely not.

Q. In carrying out your duties in this switchyard, how many of those switches, as you have told us about where the cars are uncoupled and permitted to roll down the track, would you say that you make in an 8-hour shift?

A. Well, that is a yard question to answer. It just depends on the business, that is, the trains in the yard or just how full the yard is with cars that need to be switched.

Q. Well, do you make several of those on each shift? A. Oh, yes.

Q. Can you give me any idea about the average number?

A. Oh, I couldn't give you a number. [754]

Q. Now do you know from your experience out there before July 17, '52 what Track 13 was used for? A. It was used for trainyard track.

Q. And when you say trainyard track, what do you mean?

A. Well, to run trains in and out and to store cars on.

Q. And was Track 12 used for the same purpose?

A. At times I have seen it used for that purpose.

(Testimony of Boyd Q. Craig.)

Q. Now, Mr. Craig, on the night of July 17, 1952, when this switch was being made, what was the weather condition that night?

A. It was clear.

Q. And was it dark or dusk?

A. It was just getting dusk.

Q. Getting dusk? A. Uh-huh.

Q. At the time you were standing there watching the Addison Miller dock, did you see any white lights on the dock, on the Addison Miller dock?

A. There was some white lights over on 12, on the 12 side of the dock.

Q. And which is the 12 side?

A. The south side.

Q. Did you notice any lights on the 13 side, the north side; that is, before you switched these cars?

A. The 13 side, to my knowledge, was dark.

Q. Now when you see lights, either on the 12 side or on the 13 side, white lights, does that mean anything to you as far as the work going on at the Addison Miller dock?

A. Not unless there is a blue light on the dock.

Q. At any time between 3 o'clock, when you came to work, and 8:20 in the evening, when you went to lunch, had you spotted any salt car on Track 13? A. No, sir.

Q. Had you at any time during that period from 3 o'clock to 8:20 p.m. on that day pulled any salt car off of Track 13?

A. To my knowledge, no.

Q. Well, Mr. Craig, when these 14 cars that you

(Testimony of Boyd Q. Craig.)

have told us about were being put on Track 13, were there any cars on Track 13 at that time?

A. Yes, there were cars down on 13.

Q. Did you know what cars those were or anything? A. No, sir.

Q. Who had that knowledge?

A. The yardmaster would have that knowledge.

Mr. Cashatt: You may inquire. [756]

Cross Examination

Q. (By Mr. Etter): Mr. Craig, would you mind stepping down and taking this red pencil and marking on the chart where you were standing as the switch movement was passed? Would you mark it up there where you were?

A. Here (indicating), there is supposed to be a double switch right in here, one for the shanty track and toward this pocket yard, and it would have been right in here (marking on exhibit).

Q. You were standing there when the switch movement started? A. Yes, sir.

Q. That is, with reference to bringing the cars over from Track 43 onto Old Main before you took them down the Old Main off on the lead down 13?

A. Yes, sir.

Q. Is that right. Will you put your initials "B.C." on there, Mr. Craig?

A. (Witness complies.)

Q. And did I gather you brought them down to the Old Main on this line? What track is that?

A. Well, that would be the lead going to the

(Testimony of Boyd Q. Craig.)

pocket yard or the lead for the round house tracks.

Q. All right. What you did, you came off 43 down this lead [757] to the Old Main, is that right?

A. Well, let's see. You don't touch that, it is right up in here is where that that takes off toward this pocket yard.

Q. All right, how did you come onto the Old Main? A. Well, it is right out——

Mr. Cashatt: Speak up now.

A. Right out of 43 up to here (indicating), right along there, and right onto the Old Main.

Q. (By Mr. Etter): That is how you got in there? A. Yes.

Q. All right. Now when you got to the Old Main, were the string of cars pulled right up in front of the yard office? A. Yes, sir.

Q. And how long were you there in front of the yard office?

A. As I recall, not more than a minute.

Q. Not more than a minute?

A. As I recall.

Q. Are you sure of that?

A. Well, ordinarily, we wouldn't hang on to the cars for any other reason unless we happened to be blocked, and I don't remember whether we were blocked at the time or not.

Q. Well, as I gather what you are testifying to, Mr. Craig, [758] is that you picked these cars up and you brought them down, as you have indicated, past the switch signal, below the switch signal which carries your initials "B.C.," down to the Old

(Testimony of Boyd Q. Craig.)

Main which is indicated on the map in front of the yard office, and you stopped there not more than a minute and you began your switch movement; is that it? A. Yes, sir.

Q. I think in your direct testimony you said you started up in here (indicating), there was only three minutes involved in pulling 14 cars down along that track past your initials down to the Old Main in front of the yard office and beginning the switch movement, three minutes; is that right?

A. That's right.

Q. So that I gather that from the commencement of the movement of bringing the cars, the 14—there were 14, weren't there?

A. Yes, sir.

Q. ——the 14 cars off 43, from the moment that you started the movement off of 43 until you started to take them onto the lead and down to 13, that involved the elapse of only three minutes?

A. Yes, sir.

Q. Now, Mr. Craig, after the movement started —I am [759] referring now to the movement out of the Old Main onto the lead and down to Track 13 north of the icing platform—where were you standing when that movement started?

A. Right at this point right here (indicating).

Q. You were still here when the movement started from the Old Main down this way?

A. Yes, sir.

Q. And that is approximately, if you take a look here——

(Testimony of Boyd Q. Craig.)

Mr. Cashatt: Well, now, I object to that. That isn't drawn to scale there, the top part there.

Q. (By Mr. Etter): All right, how many feet were you from the Old Main on this switch? How far were you from the Old Main?

A. Possibly that would be from the working lead, that wouldn't be the Old Main.

Q. All right, from the working lead. The working lead, as I get it, is the first switch off of Old Main? A. Well, that would be your 8 Switch.

Q. All right, that is your working lead.

A. From there all the way down to the working lead.

Q. Where were you at the nearest point from the working lead?

A. I would say about 40 feet.

Q. About 40 feet. And you were there when the switch [760] movement started? A. Yes, sir.

Q. All right, then what did you do?

A. I stayed in this position until I saw the cars going down around the bend into 13, watching for a blue light.

Q. You stayed here? A. Yes, sir.

Q. Until these cars went down around this bend, is that the idea? A. Yes, sir.

Q. Watching the blue light? A. Yes, sir.

Mr. McKevitt: Watching for the blue light.

Mr. Etter: Watching for the blue light.

Q. All right, when the movement of the train went down through Switch 13, how far were you away from Switch 13?

(Testimony of Boyd Q. Craig.)

A. Well, it would be six or eight car lengths away from the 13 Switch.

Q. Six or eight car lengths? A. Uh-huh.

Q. In other words, 240 to 320 feet, approximately? A. 220, yes.

Q. About 100 yards? [761] A. Well——

Q. Approximately? A. Yes, 40-foot cars.

Q. All right. And would you say that was the position you were in when the last of the 14 cars crossed over the switch onto the 13 Track?

A. Yes, sir.

Q. Now assuming that you were in this position over here when these cars came over this switch onto 13 and the blue light was snapped on down here, is it my understanding that you could have stopped those 14 cars?

A. Not at that point when the cars were in there, the cars were delivered on the track then. After they had got off of the lead, they were in on their track.

Q. Well, I know, but I thought you said you could grab a hand brake or something and stop them?

A. I mean when the cars were going by here (indicating), I could have got a hand brake.

Q. When they were going by here?

A. Yes.

Q. But you couldn't when they got down to this switch and started around that switch, you couldn't have stopped those cars then if you had got a light down here, could you? A. No, sir. [762]

(Testimony of Boyd Q. Craig.)

Q. Beg pardon? A. No, sir.

Q. And so far as this particular switch movement is concerned, from at least when the cars were at Switch 13, from there, that point, down to the salt house, there was no control that you could exercise over those cars at all, was there?

A. No, sir.

Q. Do you know what the distance is between the icing platform and 13 Switch?

A. I would say it was about possibly 16 car lengths.

Q. 16 car lengths. 840 feet, 40-foot car—640, is that it? A. 640.

Q. 640. You may have heard it testified that the distance from the salt house up to the yard office is about 2,050 feet. Now effecting that comparison, just trying to get it right, in other words, from the salt house here to the yard office, 2,050 feet; this is your 13 Switch; this is drawn to scale of one inch to 20 feet; would you revise that estimate after looking at that now as to the distance between the 13 Switch and the salt house?

Here we are back here (indicating). Now it has been testified by your man, your engineer, that it is [763] approximately 2,050 feet from that yard office down here to the icing platform. Here is the No. 13 switch. Now would you revise that estimate of the distance from 13 down to that salt shed after looking at that, Mr. Craig?

A. Well, I am no judge of distance. You asked me the question.

(Testimony of Boyd Q. Craig.)

Q. But I mean looking at this chart, isn't it quite obvious that it is a lot longer between the salt shed and 13 and the yardmaster's office?

A. Yes, it is.

Q. And if that is 2,050 feet, then this switch would be well over 1,000 feet, wouldn't it, from the salt shed? A. Yes, it would.

Q. Well over 1,000 feet.

Mr. MacGillivray: 1,200 feet.

Mr. Etter: 1,200. Is it 1,200?

Q. All right, Mr. Craig.

(Witness resumed stand.)

Mr. Craig, do you recall that on July the 19th of 1952 you had a talk or a discussion about the circumstances surrounding this accident referring specifically to your switching duties on the night of the 17th of July, 1952, with Mr. Thomsen, the claim agent for the Northern Pacific? [764]

A. I don't believe I spoke to Mr. Thomsen about it, I believe there was another claim agent.

Q. There was another one?

A. Another claim agent.

Q. Was the name of the other claim agent, McNew?

Mr. McKevitt: McGrew.

A. McGrew, I believe.

Q. (By Mr. Etter): McGrew, some such name, do you recall? A. I believe it was McGrew.

Q. Yes. Do you recall whether or not you told Mr. McGrew that you or your foreman Prophet had pulled 14 cars out of Track 13, and then had

(Testimony of Boyd Q. Craig.)

walked to the 13 Switch, that he had lined it for Track 13, and that that took place about 8 o'clock? Did you then tell him that you pulled onto the Old Main and were tied up there for about 10 minutes by another engine before you cut the cars loose?

A. I don't believe I said that in my testimony or in my report to Mr. McGrew. I don't recall that in the testimony.

Q. Well, did you give Mr. McGrew a statement, do you recall, in which you said that?

Q. I gave Mr. McGrew a statement, but that wasn't in the statement.

Q. You are sure it was not in the statement?

A. I'm pretty positive it wasn't.

Q. Well, let me ask you if you made this statement: "We pulled onto Old Main and were tied up for about 10 minutes by another engine before these 14 cars were cut loose?"

A. Well, if I signed that statement, that was fresh in my mind when he took that statement.

Q. Well, then, actually, it is the fact, isn't it, that you were parked out there in front of the yardmaster's office for about 10 minutes after you moved the cars over onto the Old Main? Is that the fact?

A. If it was in my testimony, it is.

Q. Well, here is a copy of the part that I am referring to that was given to us by counsel for the Northern Pacific, and I will just direct your attention to these last three lines right here, Mr.

(Testimony of Boyd Q. Craig.)

Craig, just so that we can refresh your recollection.

A. Yes, that was my testimony then.

Q. Is it your best recollection, Mr. Craig, that that was probably right, that you were there for about 10 minutes? A. Yes, sir.

Q. Now during the time that those 14 cars were being held in front of the yard master's office for a period of 10 minutes, as you have indicated, were you then standing [766] over on Track 8 or 9?

A. Well, during that time, I was between the place where I designated on the board there and approximately at the 9 Switch, right in that distance.

Q. Beg pardon?

A. Approximately in that distance, between that place where I showed you on the map.

Q. And where?

A. And then the 9 Switch.

Q. Well, you stayed, though, as I gather it, in this position which you have indicated up above the Old Main, as indicated by your red mark, you stayed there while the cars were kicked loose and down Old Main and onto the lead and down through the switch; you were there at all times?

A. While the cars was being kicked into 13, I was at that point.

Q. And you were there when they went past the Old Main and on the lead? A. Yes, sir.

Q. And you were there while they passed by in front of you? A. Yes, sir.

(Testimony of Boyd Q. Craig.)

Q. And you were there when they went onto Track 13? A. Yes, sir. [767]

Q. Some 40 feet away in approximately that position, and you were there for the purpose of looking down, as I gather, to see if there was a blue light? A. Yes, sir.

Q. Well, now, Mr. Craig, didn't you tell Mr. Thomsen or Mr. McGrew on July 19, 1952, that when Prophet saw that the switch at 13 was lined for Track 13, he had the man following the engine cut the 14 cars off the engine. "I was between Track 8 and 9 and watched the cars come by me. They were moving very slowly down at slight downgrade of the lead." Did you tell him that?

A. That's right, I was right there at that switch that is between 8 and 9.

Q. Where were you standing?

A. In a place where I marked on the map.

Q. It is between 8 and 9?

A. It is approximately right north of 9 Switch.

Q. Would you step down here again, please?

Step up here, Mr. Craig. These tracks are numbered here. A. Yes, sir.

Q. This is 8 and 9, isn't it? A. Yes, sir.

Q. All right, now, can you tell us where you would be if you were standing between 8 and 9 when the cars went by [768] you? What do you mean by that?

A. I was right at this point here (indicating). That is just about north of N. 9 Switch.

(Testimony of Boyd Q. Craig.)

Q. Well, you didn't mean that you were standing down here between 8 and 9 (indicating)?

A. No, no.

Q. As they went past you?

A. Of course not.

Q. Beg pardon? A. Of course not.

Q. You were standing up in here. What was this position, how would you describe it, so we know what track that is?

A. Well, that is—one switch is off of the shanty track that runs right directly in front of the yard office, and the high switch is for the pocket yard.

Q. Well, then, you were really standing up by the switch that goes to the shanty yard and the pocket yard; you weren't standing between Tracks 8 and 9?

A. No—well, that is 8 there (indicating). I didn't mean I was standing in the track, when you speak of that; I told him that I was right opposite the 9 Track.

Q. I see, all right. Did you go to lunch with Mr. Prophet? A. Yes, I did.

Q. You did. [769] A. Yes.

Q. After the cars started over the 13 Switch or over the switch, the 13 Switch itself, onto Track 13, did you continue to look down for a blue light?

A. After the cars had gone into the 13 Track, I headed for the yard office.

Q. You headed for the yard office?

A. Yes.

Q. In other words, if the blue light had gone on

(Testimony of Boyd Q. Craig.)

after they got over the switch, you wouldn't have seen it, anyway? A. Maybe not.

Q. Well, the fact is you wouldn't, would you?

A. No, sir.

Q. Now when you looked down, as I gather your testimony, Mr. Craig, you saw no blue light on Track 13 and no illuminated lights along Track 13, is that right? A. Yes, sir.

Q. Well, what did you see on Track 13, if anything?

A. I saw cars down in the track aways.

Q. You saw cars in the track? A. Yes.

Q. And that was just prior to 8:20, wasn't it?

A. That was approximately 8:15, 8:20, yes. About 8:15.

Q. Wasn't it dark?

A. It was just dusk. [770]

Q. It was just dusk? A. Dusk.

Q. You could see the cars? A. Yes, sir.

Q. You could see the cars, freight cars, down there, but you couldn't see any illuminating lights?

A. No, sir.

Q. And it was light enough, I gather, that you could look down a thousand feet or more, 1,200 and some feet, and as I gather it, you were some distance even away from Switch 13 when you were over here standing where you say you were?

A. Yes, sir.

Q. How far were you from Switch 13?

A. Oh, let's see——

Q. You said you were 40 feet from the Old

(Testimony of Boyd Q. Craig.)

Main, I think. Now how far were you from Switch 13? A. About six car lengths.

Q. Six car lengths. You were about——

A. About eight car lengths.

Q. You were about 320 feet? A. Yes, sir.

Q. So you were about 1,600 feet away from the icing dock, it was 1,600 feet down the track from you? A. Yes, sir. [771]

Q. And you could see cars down there even though it was dusk or almost dark?

A. Yes, sir.

Q. And you could see that despite the fact there were no lights along the side of No. 13?

A. Yes, sir.

Q. You saw lights, however, along the side of 12? A. Yes, sir.

Q. What were they doing along 12 there?

A. Well, there was no activity on 12 or 13 that I could see.

Q. No activity on 12 or 13?

A. Just the lights were on on 12.

Q. Were there cars in alongside on Track 12?

A. I don't recall.

Q. You don't recall?

A. I don't recall that there was any in there. I wasn't looking for cars on 12.

Q. Well, but you were looking for them on 13?

A. Yes, sir.

Q. And why was that?

A. Well, just to see that the cars—well, I don't know. When you dump cars into a track, you see

(Testimony of Boyd Q. Craig.)

what you have got ahold of, whether the car is going to hold it or whether they are going to hang out on the lead. [772]

Q. Why were you looking for cars on 13? What is your answer to that? You say you weren't looking for them on 12 but you were on 13. Why?

A. I wasn't looking for the cars, I just happened to see the cars there.

Q. You happened to see them? A. Yes.

Q. And you happened to see them accidentally, although there were no lights and although it was 8:15 or 8:20 and you were 1,500 feet away, you just accidentally saw those freight cars on Track 13; is that correct?

Mr. McKevitt: Object to the form of that question, argumentative.

Mr. Etter: Cross-examination.

The Court: Overruled.

A. The cars in there were immaterial to me, there was just cars in there.

Q. (By Mr. Etter): But what I am trying to get at, you happened to see them even though the lights were out?

A. I saw that there were cars in there, yes, sir.

Q. And on the other side, that is, on Track 13, you saw the lights along but noticed there were no cars?

A. Not on—you mean 12?

Q. On 12, you noticed there were no cars on 12?

A. I didn't say that, I said I didn't pay any

(Testimony of Boyd Q. Craig.)

particular [773] attention, I had no dealings on 12 at all.

Q. That's right. You say you don't remember, is that right?

A. Whether there was cars in there or not was immaterial. We had no cars for 12 so I wasn't looking in there.

Q. Well, are you sure that the row of lights wasn't on Track 13 and not on Track 12? Are you certain, Mr. Craig, that this row of lights wasn't on the same side as where you saw these cars?

A. To my recollection, the 13 side was dark.

Q. The 13 side was dark. And is that where you could see the cars? A. Yes.

Q. The 12 side was light, but you didn't notice whether there was any cars? A. Yes.

Q. Is that correct? A. Yes.

Q. Was there a blue light on 13?

A. No, sir.

Q. Was there a blue light on 12?

A. No, sir.

Q. There was not? A. No, sir.

Q. You have been switching out there how many years? [774] A. Since January, 1945.

Q. January, 1945? A. Yes, sir.

Q. And you have switched there in the summertime? A. Yes, sir.

Q. When is the height of the activity around the ice dock, when does it start, Mr. Craig?

A. Oh, maybe the latter part of July.

Q. In July? A. The latter part of July.

(Testimony of Boyd Q. Craig.)

Q. It continues through what date?

A. Through August.

Q. Through August. And is that the high point of the shipments of perishables in your yard? I mean, in your experience switching, you see more activity then? A. I would say yes.

Q. You would say yes. And, ordinarily, is it a fact that when there is activity down there, the lights are illuminated on the dock? A. Yes.

Q. I mean, that is an indication to you that there is some activity when the lights are on, isn't that so?

A. I have seen lights on the dock where there wasn't anybody working.

Q. Taking a breather or taking 5? [775]

A. Could be.

Q. Could be. But they run three shifts there, don't they, during the summer, usually?

A. I believe they do.

Q. They do. And those lights are on a considerable part of the time? A. Yes.

Q. And cars are iced and freight is shipped in and out of there 24 hours a day during the busy season? A. Well, it could be.

Q. Isn't that correct?

A. Well, at intervals, different times, there is cars in and out of there.

Mr. Etter: That is all.

The Clerk: I have marked Defendant's 41 for identification.

(Testimony of Boyd Q. Craig.)

Redirect Examination

Q. (By Mr. Cashatt): Mr. Craig, Mr. Etter picked out parts of a statement that you had given to the claim man McGrew. Is that the original statement that you signed at that time?

A. Yes, sir.

Q. Is that your signature at the bottom?

A. Yes, sir, it is. [776]

Q. And what Mr. Etter was referring to was a copy of this, is that right?

A. I believe it is, yes.

Mr. Cashatt: Offering Exhibit No. 41 is evidence.

Mr. Etter: No objection.

The Court: It will be admitted.

(Whereupon, the said statement was admitted in evidence as Defendant's Exhibit No. 41.)

Mr. Cashatt: May I read the same to the jury, your Honor?

The Court: All right.

Mr. Cashatt: (reading)

"Statement of B. Q. Craig, age 42, married, address 2714 N. Perry, Spokane, Wash., phone GL 8123, occupation switchman, in service with N. P. Ry. Co. since 1945, made in connection with injuries to Gerald Stin*zi,* icehelper, Addison-Miller Co., Yardley, Wn., July 17, 1952 at about 8:15 p.m. I was field man on the 3:15 p.m. Yardley switch job, on July 17, 1952 and was on duty between 3:15 p.m. to 11:15 p.m. on this date. Prophet [777] was foreman, Morton was following the engine and we

(Testimony of Boyd Q. Craig.)

had engineer Pilik and fireman Wynn Jr. I know nothing about this accident other than that it occurred and I never at any time saw the injured man or went to the scene at any time. As I recall right after fruit train arrived which came in about 5:30 p.m. this day our crew went into Track 13 and picked up two cars for Lewiston—two for the city and with about four other cars and this then left the track clear. As I recall we did not later put any cars in this track until the time we let 14 cars drift into this track from off the lead. Foreman Prophet had gone in to track 43 and pulled out 14 cars and then he had walked to No. 13 switch and lined it for track 13 as he intended to put these 14 cars in this track. This was taking place at about 8:00 p.m. We pulled onto old main and were tied up for about 10 minutes by another engine and then before these 14 cars were cut loose, I walked over to where I could look down 13 track and there saw no blue light and therefore believed the track clear. In fact there was no light showing at all on track 13 and I did not see any men working on track 13. I looked down and did [778] see some cars on track 13 and they appeared to be at about the middle of the dock. Not seeing any blue light or anyone working around track 13 I assumed that it was clear, account it is the practice and custom that when the ice dock people are working at the dock on track 12 or 13 the blue light would be on and then we would give it blue light protection. I assumed no one was working on track 13. When Prophet saw

(Testimony of Boyd Q. Craig.)

that the switch at 13 was lined for track 13 he had the man following the engine cut the 14 cars off of the engine. I was between track 8 and 9 and watched the cars come by me and they were moving very slowly down the slight down grade of the lead. They had come off of old main where the engine was. There was no kick but rather we just got the pin and the cars drifted slowly onto the lead and into track 13 where they were intended to go. The cars were not going any faster than three miles per hour and no one was riding them. Actualling it did not look as though these cars were going fast enough to get into the clear on track 13 of the lead. Track 13 is considered a train track and cars are expected to go down this track at any time except when the blue light or blue flag is up or lighted. We use [779] this track for all kinds of switching operations. Not seeing any blue light at time we cut these cars loose, I assumed that no one was working on track 13 at the ice dock. As far as I know the cars we let drift down into track 13 were not deffective in any way. The weather was clear and it was getting dusk and visibility was good. I have read the above statement and it is true.

/s/ B. Q. Craig."

Mr. Cashatt: That is all.

The Court: Any other questions of this witness?

Mr. Etter: No questions.

(Testimony of Boyd Q. Craig.)

The Court: I will excuse the jury for a 10 minute recess.

(Witness excused.)

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: I think in the interest of trying to conclude this case, as I am desperately trying to do, that I will have to modify my ruling so far as these statements are concerned, particularly does that apply to what I assume are self-serving statements taken by the defendant of its own witnesses. [780]

Now I think opposing counsel has a perfect right to call attention to discrepancies between the statement and the testimony of the witness. That doesn't mean, I think, that the whole long statement can then be put in and read; it is only material if counsel leaves out something that explains the discrepancy or straightens it out or explains it, then that part of the statement might be used. But, obviously, if Mr. Etter calls attention to one line of a 100 page deposition that you have taken on discovery, that doesn't permit you to stand up and read the rest of the deposition to the jury for two hours. We have got to cut down that practice or we never will get through here.

Mr. Cashatt: I agree with your Honor on that. The only thing, he had called attention to some parts and I did want to clear it up.

Mr. Etter: Two lines.

Mr. Cashatt: I will abide by the ruling.

The Court: I think the rule should be that if he

calls attention to some part of the statement and then there is some other part that explains or has some bearing on it, you may read that, but not read the whole statement or we will be reading statements for well into August.

Court will recess for 10 minutes.

(Whereupon, a short recess was taken, after which the following proceedings were had in the presence of the [781] jury:)

The Court: All right, proceed.

Mr. Cashatt: I might say this, your Honor, we have Mr. Morton, the other member of the crew that has been mentioned here several times in the evidence, and I will say that it wouldn't add anything to what is in evidence at this time and I won't bother to call him unless the other side would like to have him.

The Court: Well, he is here available?

Mr. Cashatt: He is right in the courtroom available.

The Court: All right.

Mr. Cashatt: Call Mr. Swanson, please.

RALPH W. SWANSON

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name is Ralph W. Swanson? A. That's right.

Q. And are you employed by the Northern Pacific Railroad? A. Yes.

(Testimony of Ralph W. Swanson.)

Q. How long have you been in their employ?

A. Since 1918. [782]

Q. And what is your present job for the Northern Pacific?

A. Over, short and damage clerk, freight claims.

Q. Freight claims? A. Yes.

Q. You live here in Spokane, Mr. Swanson?

A. Route 2, Colbert.

Q. And how long have you lived here in Spokane? A. Since 1909.

Q. Now on July 17, 1952, were you employed by the Northern Pacific at Yardley? A. Yes.

Q. And what was the nature of your job at that time? A. Assistant chief clerk.

Q. And what is the assistant chief clerk?

A. Supervising clerical duties and clerks, their particular duties.

Q. And are the records of the different ones, are those under your supervision, your over-all supervision? Were they at that time? A. Yes.

Q. And as far as the salt and ice journal, Exhibit No. 39 for identification, were you familiar with that record as of July 17, 1952?

A. Well, I am familiar with the record, yes.

Q. Is that a regular record that is kept in the course of [783] business at Yardley?

A. Yes, for the purpose, not of any Interstate Commerce Commission report, but the purpose of how much salt and ice we use, and so on.

Q. And that record has been kept at Yardley ever since? A. Yes.

(Testimony of Ralph W. Swanson.)

Q. And I believe you brought it here this morning to the courtroom? A. Yes.

Q. And the record is a regular daily or running record?

A. It is a running record of the ice foreman.

Mr. Cashatt: Again offer Exhibit No. 39, your Honor.

Mr. Etter: No objection.

The Court: It will be admitted, then. What is that number, Mr. Cashatt?

Mr. Cashatt: No. 39, your Honor.

Mr. Etter: You are just going to put in the few pages, Mr. Cashatt?

The Court: The ones that were marked before?

Mr. Cashatt: That is correct.

(Whereupon, the said records were admitted in evidence as Defendant's Exhibit No. 39.)

Q. (By Mr. Cashatt): Mr. Swanson, referring to the pages that are marked Exhibit 39 here, that is for the year of 1952, is that correct, for salt?

A. Just a moment. Yes, salt ordered for 1952.

Q. And looking at the date, it starts in January, does it? A. Yes, January 1st.

Q. Runs on, February, March, on through?

A. Yes.

Q. Now in July, is there any date in July that a car of salt was received at the Yardley yards?

A. Yes, this is the date that it was ordered for, July 15th; this is the arrival date (indicating).

Q. And referring to the date shown after the order date of July 15th, will you give the car num-

(Testimony of Ralph W. Swanson.)

ber and the date received, and so on, as shown from the exhibit?

Mr. MacGillivray: Just a minute, your Honor, I think the exhibit speaks for itself. As I understand the witness, he doesn't know any more about it except he is——

Mr. Cashatt: Maybe I can shorten this by reading it.

The Court: Yes, it is in evidence, I think you can call attention to it. It will be all right for you to do so.

Mr. Cashatt: That is fine.

Opposite the date of July 15th, the order date for car of salt, the record shows Great Northern 20206 [785] received, in one column, 7-16; unloaded 7-16. And below that, the next salt car is shown P & E 3235, received 7-18; unloaded 7-18.

Q. Now during your work with Northern Pacific, have you ever had anything to do with the icing end of the business?

A. Yes, I was ice foreman out there for a number of years.

Q. And would your testimony, Mr. Swanson, be substantially the same as Mr. Williams' concerning the duties of the ice foreman? A. Yes.

Q. And in addition to that, were you ever an ice helper? A. No.

Q. I see. Now in your experience as an ice foreman, did you at any time give any direct instructions or have any direct supervision over any of the Addison Miller employees? A. No.

(Testimony of Ralph W. Swanson.)

Q. What work did you do when you were on the ice dock?

A. To see that the amount of ice and salt was placed into the bunkers of refrigerators or cars as called for, and to fill them up as needed, as the cars needed.

Q. While you were around the ice dock, the Addison Miller dock, did you at any time ever see Addison Miller employees dumping slush ice? [786]

A. No.

Q. Did you at any time, Mr. Swanson, ever see Addison Miller employees carrying buckets of slush ice or otherwise under the couplings of stationary cars standing on Track 13? A. No.

Q. Mr. Swanson, were you familiar with the lights on the dock in July, 1952?

A. Yes, I believe I am.

Q. And were you at that time?

A. And was at that time.

Q. And what did it indicate to you if at any time, say, at night you saw these lights burning on the Addison Miller dock?

A. It meant nothing to me.

Q. The white lights? A. The white lights.

Q. And what did it mean to you if you saw the blue lights at the west end of the Addison Miller dock or at the east end of the Addison Miller dock on?

A. Well, it meant that someone was on or about cars.

(Testimony of Ralph W. Swanson.)

Q. And when did you leave your work at the Yardley office?

A. I believe December 1, 1952.

Q. How long did you say you were ice foreman?

A. Well, I couldn't be sure, but I think I started about [787] 1940 as ice foreman.

Q. And possibly worked until about when?

A. To December, 1951.

Q. And during that period of time, were you familiar with the communication system between the yard office and the Addison Miller dock?

A. Yes.

Mr. Cashatt: That is all.

Cross-Examination

Q. (By Mr. MacGillivray): Mr. Swanson, there are two communicating systems between the yard office and the dock, aren't there, or is there not?

A. Not between the yard office and dock, no.

Q. Well, isn't there a telephone communicating system and a loudspeaker communicating system?

A. Not on the dock there isn't any loudspeaker.

Q. Well, there is a loudspeaker running from the yard office that can be used to the Addison Miller dock, isn't there?

A. Not that I know of, not on the dock.

Q. Well, is there not a loudspeaker just west of the Addison Miller dock?

A. Yes, west of the Addison Miller dock. [788]

Q. And is that not operated from the yard office? A. Yes.

(Testimony of Ralph W. Swanson.)

Q. And that can be and has been used as a communicating system between the yard office and the dock?

A. I have never used it. I have called from the loudspeaker to the yard office, but I have never used the loudspeaker from the yard office to the dock.

Q. Well, it can be used either way, can't it?

A. Well, to the west end of the dock, yes.

Q. In other words, if you want to advise someone down at the icing dock of the imminent approach of cars at night or in the daytime, you can open your loudspeaker in the yard office and say, "Look out, boys, here comes some floating cars on Track 13" through the loudspeaker system, can't you? A. Well, you couldn't possibly——

Q. Can't that be done, Mr. Swanson?

A. Yes, it could be done, but you couldn't possibly hear what they were saying. It would probably be a little blurred.

Q. You couldn't hear what?

A. You couldn't understand what they were saying if you were on the dock.

Q. Well, Mr. Swanson, can't you hear that loudspeaker system all over the Yardley yards when it is used? [789] A. Well, not all over.

Q. Well, how many loudspeakers do they have in the Yardley yards, the one west of the dock and what others?

A. I think there is one at the east end of the yard.

Q. Yes?

(Testimony of Ralph W. Swanson.)

A. One at the west end of the yard.

Q. Yes, and this one west of the ice dock. And the yard is how long from west end to east end?

A. Oh, the longest track, 150 some cars, I believe.

Q. Well, what is the distance from the west end of the Yardley yard to the east end?

A. Roughly, a mile and a half.

Q. And what is the width from the north end to the south end? A. I couldn't say.

Q. Approximately?

A. Oh, let me see. Are you referring just to the trainyard or the whole yard?

Q. What is referred to as the Parkwater yard.

A. Well, the Parkwater yard from Trent Avenue to the south end of the yard, I would say about six, eight blocks.

Q. And that loudspeaker system with one outlet at the east end, one in the center by the icing dock, and one at the west end, is the loudspeaker communicating system for that whole mile and a half yard, isn't it? [790]

A. They use one at a time, they aren't connected together at the same time.

Q. Well, do I understand you correctly that you couldn't hear the loudspeaker system immediately west of the icing dock if you are on the icing dock?

A. If the wind conditions were right and everything was right, you might be able to.

Q. If it is a nice, clear summer night?

(Testimony of Ralph W. Swanson.)

A. If no chains, nothing was running, you could possibly.

Q. I see. Were you in the yard office the night of July 17, 1952? A. Yes.

Q. Do you know whether or not that loudspeaker system was used around 8:15 or 8:20 p.m.?

A. I couldn't say.

Q. Pardon?

A. I couldn't say for sure now.

Q. When were you ice foreman, from 1940 to——? A. I would say 1940 to 1946.

Q. 1940 to '46?

A. Then I was on a traveling refrigerator inspector position during '46 and '47; then back to the ice foreman's job until around 1951.

Q. And you had supervision over the icing operations insofar as icing of Northern Pacific cars at Parkwater was [791] concerned when you were icing foreman? A. Yes.

Q. Did you get down to the dock quite often?

A. Oh, yes.

Q. And the dock is about how long?

A. Oh, 27, 8 cars.

Q. About how many feet?

A. 40 feet to a car, we might say roughly.

Q. What is it, about three or four city blocks, something like that? A. Oh, yes.

Q. And the white lights on top of that dock on the north side and south side, do you know how many there are?

A. No, I couldn't say.

(Testimony of Ralph W. Swanson.)

Q. Do you know that over that four block length they are interspaced at about 48 foot intervals on each side? A. That could be.

Q. Well, isn't that about it?

A. That is close, I would say.

Q. And during your career as icing foreman, you were familiar with the type of crew that they had down there working for Addison Miller, particularly during the summer months?

A. Yes.

Q. A lot of high school kids work? [792]

A. Well, not too many that I had seen during my time.

Q. Well, quite a few? A. A few.

Q. And, ordinarily, it is a transient, not a permanent crew, is it not? A. Transient, yes.

Q. Some of them will work a couple of days, is that right, and two days later have practically an entirely different crew? A. Yes.

Q. And that has been the situation clear up to 1952 and through 1952?

A. Well, at times during the war years, we had, I believe, extra gangs they called in there permanent, permanent crews.

Q. Say from 1948 to 1952, that was the situation? A. Yes, more or less.

Q. And everyone connected with the yardmaster's office knew that situation?

A. Well, I don't know that everyone knew it, no.

Q. Well, everyone of any authority in the yardmaster's office?

(Testimony of Ralph W. Swanson.)

A. Not necessarily, some wouldn't have contact with the icing propositions at all.

Q. And the heavy season there at the icing dock when they [793] worked around the clock is during July and August?

A. Well, the heaviest season, I would say, would be August and September.

Q. Well, don't they work around the clock in July?

A. Not as much as August and September. They work around the clock all year around, 12 months a year.

Q. I see. Who pays the electricity bill down on the icing dock?

A. I don't know, I couldn't say.

Q. Don't you know that the Northern Pacific does?

A. No, I couldn't say that, I wouldn't know.

Q. Well, it is a fact, is it not?

Mr. McKevitt: I want to object to the form of that question as being a statement of fact by counsel—"Don't you know that the Northern Pacific does."

The Court: Well, the jury will understand that counsel's question is not evidence, or his statement is not evidence.

Mr. MacGillivray: Well, I understand.

Mr. Cashatt: If counsel is going to cross examine on the contract, I would like to mark it and have it admitted at this time.

Mr. MacGillivray: I have been waiting for that

(Testimony of Ralph W. Swanson.)

to happen. There is just one question in the contract that is not material, but the balance of it we have been hoping would [794] get in.

The Clerk: Are you having it marked a defendant's exhibit?

Mr. Cashatt: Yes, the defendant's exhibit.

The Court: Yes, I understand the defendant is offering it. What is the number?

The Clerk: It will be No. 42, your Honor.

Mr. MacGillivray: We can stipulate with it with one exception in the contract, one sentence that is not material, that we might point out to your Honor.

Mr. McKevitt: The contract is referred to in its entirety in the pleadings.

Mr. Etter: No, there is a part that we want——

The Court: I will ask the jury to step out a minute and take a little recess while we thresh this out.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: There is one thing that I wondered about this contract, doesn't it show that there is an agreement for Addison Miller to hold the N. P. harmless? I don't know whether that is analagous to insurance, but I would be a little afraid of it, especially if there is any objection to it, bringing that out, that sort of situation. It seems to me it would be fairer to all concerned to not bring it out. I don't know, I haven't thought out how who it might favor, really.

(Testimony of Ralph W. Swanson.)

Mr. Cashatt: This is the main body of the contract, if you would like to look at that.

The Court: Is that what you had in mind?

Mr. MacGillivray: Well, I had in mind the first sentence of that same provision. It is Provision XII, and we object to that portion of Provision XII ending in the words "State of Washington." It is a matter that was taken up on motion sometime ago.

The Court: I think this is what you have in mind, that it provides for workmen compensation, and the contractor, I presume, is Addison Miller——

Mr. Etter: That's right.

The Court: ——agrees to save the railroad company harmless. Would counsel be willing to stipulate to eliminate Paragraph XII from the contract?

Mr. Etter: We will stipulate that it can be eliminated.

Mr. MacGillivray: We have no objection to the "hold harmless."

The Court: I am not trying to tell you what to do.

Mr. Etter: No, we have no objection to the "hold harmless." They can leave that in if they want.

The Court: I think if we eliminate the workmen [796] compensation, we should eliminate the "hold harmless." As I say, I don't know whether——

Mr. Etter: Your Honor, you struck that on mo-

(Testimony of Ralph W. Swanson.)

tion. That was a defense, that compensation, and it was struck on motion.

Mr. McKevitt: You are willing to have "hold harmless" stay and you are willing to stipulate workmen's compensation go out?

Mr. Etter: Yes, we are willing to stipulate, or the whole thing go out.

Mr. McKevitt: You pleaded the contract; why call upon us to decide what to do with it?

Mr. MacGillivray: Well, if you are offering the contract, we are objecting to the words in Article XII ending with the words "State of Washington."

The Court: I think to make a complete record, at least so much of this contract that shows the relationship and the agreements and the method of operation of the railroad company and Addison Miller should be in this record. As I understand it, it shows an independent contractor——

Mr. McKevitt: Yes.

The Court: ——relationship, and to that extent it certainly would be favorable to the defendant, I should think. There has been some evidence slanted toward the proposition that you were controlling the employees of [797] Addison Miller and there may be an agency relationship.

Mr. McKevitt: As I recall it, your Honor, the discussion arose when I took a little slight umbrage to the fact he says, "You know that the N. P. pays the electric bill." I don't know, maybe they do and the contract provides for it. Now that was the only way that the contract was dragged into this case

(Testimony of Ralph W. Swanson.)

thus far. I don't know whether it provides whether we pay the electric bill or not.

Mr. MacGillivray: You mean you haven't read your own contract?

Mr. McKevitt: A lot of N. P. contracts I haven't read.

The Court: Is there anything else in here that is objectionable?

Mr. MacGillivray: I don't think so.

The Court: I suppose there is a good deal of it that wouldn't be very material, but would there be any objection to admission of the contract in evidence with the exception of Paragraph XII? This is a copy, we can delete it, I suppose. If there is no other way, the Clerk can cut it out and set the page up.

The Clerk: I can cut it right out of there.

The Court: Yes, just cut it out and put a backing on it of some kind before it goes to the jury.

The Clerk: That's right. [798]

Mr. McKevitt: I would leave the stipulation on that to Mr. Cashatt.

Mr. Cashatt: I believe I am the fall man.

The Court: I think if that goes in, why Mr. McKevitt may as well put on his hat and go home, because they will wonder what he is doing around here.

Mr. Cashatt: I will stipulate, your Honor, that the contract may be admitted, eliminating Paragraph XII.

The Court: Yes. Let me put it this way: I don't

(Testimony of Ralph W. Swanson.)

want counsel to go on record as agreeing to this contract or subscribing or anything of that sort. I will admit that contract in evidence with the exception of Paragraph XII. I will take the responsibility for eliminating it without any stipulation.

The Clerk: Your Honor, would this be a good time to find out when counsel are going to make copies of the pages out of the book?

The Court: Oh, yes. What is the number of this? 42?

The Clerk: That is 42, your Honor, yes.

Mr. Cashatt: I would say, Mr. Taylor, that we can take this out right now.

The Court: Take that out and then submit a copy, if you want to, and put the page back in.

Mr. Cashatt: And the same on No. 6, Mr. Taylor, and [799] No. 38 is all right as is.

The Clerk: Yes.

Mr. Cashatt: It was those two.

The Clerk: Your Honor, these two pages out of the books, then, I will just cut out. Then can I just mark out the back of it with a pen or something?

The Court: Yes. Let's see, is there anything there? Nothing that would mean much to them, I suppose. I have no objection to just lining it out.

Mr. Cashatt: Just line it out.

The Court: Just cross it out.

I thought I would quit at a quarter to six this evening, not to delay our dinners too much. I just wondered if it would be possible to finish in a two

(Testimony of Ralph W. Swanson.)

and a half hour session tomorrow morning with your testimony?

Mr. Cashatt: Oh, yes.

Mr. McKevitt: As far as we are concerned.

Mr. Cashatt: Yes, your Honor.

The Court: If there isn't too much cross examination and too much rebuttal, I presume.

Mr. Etter: I think the cross examination will be just as brief and to the point as it has been, your Honor.

Mr. McKevitt: God help us.

The Court: What I had in mind here is I have a naturalization hearing at 1:30, quite a large number of [800] applicants, that I think won't take more than an hour. If you could finish the testimony tomorrow morning, then we could argue beginning about 2:30, from then on would give us time enough.

Mr. McKevitt: We got one, two, three. Do you intend to work until a quarter until six tonight?

The Court: Yes, tonight.

Mr. Cashatt: Yes, I am satisfied we can do it, your Honor.

The Court: Do you think we should convene at 9 in the morning or 9:30?

Mr. Etter: 9:15.

Mr. Cashatt: I would think 9:30 would be all right, be done by noon.

The Court: Yes, all right, I will do that.

Mr. Cashatt: The reason I say that, we would

(Testimony of Ralph W. Swanson.)
like just a little more time on a couple of instructions. I have got some more.

The Court: Yes, all right, I will make it 9:30, then.

Call in the jury, then.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: Defendant's Exhibit 42 will be admitted, [801] with the exception of Roman numeral Paragraph XII, which the Court has directed to delete.

You may proceed, then.

(Whereupon, the said contract was admitted in evidence as Defendant's Exhibit No. 42.)

DEFENDANT'S EXHIBIT No. 42

Supplemental Agreement made this 8th day of January, 1945, between the Northern Pacific Railway Company, hereinafter called the "Railway Company", and Addison Miller Company, hereinafter called the "Contractor".

The Railway Company entered into an agreement with Addison Miller Incorporated, dated July 18, 1936, providing for the maintenance and operation of an ice plant at Yardley, Washington. Said agreement with the consent of the Railway Company, by instrument dated April 20, 1937, was assigned to the Addison Miller Company. Said agreement was altered and amended by supplemental agreements dated January 24, 1938, and October 30, 1942, and

Defendant's Exhibit No. 42—(Continued)

the parties desire to further alter and amend said agreement.

Now, Therefore, in consideration of the premises it is agreed by and between the parties hereto, that said agreement of July 18, 1936, as altered and amended by said supplemental agreements of January 24, 1938, and October 30, 1942, shall be and the same is hereby altered and amended in the following respects:

(1) By terminating said supplemental agreements of January 24, 1938, and October 30, 1942, effective as of the date and year first above written.

(2) By striking Paragraph II from said contract and substituting in lieu thereof the following:

"The Contractor shall, when directed by the Railway Company place ice in bunkers or bodies of cars set at the car icing platforms shown on Exhibit "A".

(3) By striking Paragraph IV from said contract and substituting in lieu thereof the following:

"The Railway Company shall furnish salt in cars without charge to the Contractor at the latter's plant and the Contractor will unload and store same and when directed will place salt in the bunkers of refrigerator cars."

(4) By striking Paragraph V from said contract and substituting in lieu thereof the following:

"The Railway Company agrees to pay the Contractor in each calendar year for all services hereinbefore enumerated and for electric power used in

Defendant's Exhibit No. 42—(Continued)

the operation of the plant including ice storage rooms, at the following rates:

(a) Three dollars ($3.00) per ton for the first 5000 tons of ice placed in bunkers or bodies of cars and Ninety-five cents (95c) for each ton of ice so placed in excess of 5000 tons.

(b) Twenty-five cents (25c) per one hundred (100) pounds of salt placed in bunkers of cars.

(c) The actual amount paid by the Contractor for electric power and current used in the operation of said ice plant including ice storage rooms.

(d) One and 50/100 Dollars ($1.50) per ton for all ice left in storage on termination of the agreement."

(5) By striking Paragraph VIII from said contract and substituting in lieu thereof the following:

"It is understood and agreed that the payments provided for in item (a), Paragraph V hereof, are based on the present rates paid for labor by the Contractor and that such rates may fluctuate with changes in the rate paid common labor by the Railway Company in the vicinity of Yardley, Washington. The present rate paid common labor by the Railway Company is 56c per hour. Should the 56c per hour paid common labor by the Railway Company be increased 10% or more, with the result that the Contractor is required to increase in the same proportion rates paid for labor, or should the present rate of 56c per hour paid common labor by the Railway Company be reduced 10% or more thereby enabling the Contractor to reduce in the same pro-

Defendant's Exhibit No. 42—(Continued)

portion rates paid labor, the parties shall agree upon such change in the amount to be paid under item (a) of Paragraph V hereof, as shall fairly and justly correspond with such change in rates paid for labor by the Contractor."

(6) By striking Paragraph XV from said contract and substituting in lieu thereof the following:

"This agreement shall become effective on March 1, 1942, and shall continue in force for a period of one year, and from year to year, thereafter, unless terminated by either party by written notice served on the other on or before November 15, 1943, or on or before November 15th of any succeeding year, of its intention to terminate the agreement as of December 31 of that calendar year.

On the termination of the agreement said ice plant shall be turned over to the Railway Company in good current operating condition."

(7) By adding a Paragraph designated XVIII to said contract reading as follows:

"The Contractor shall prosecute the work under this contract according to its own manner and according to its own methods and with and by its own means and employees, free from any supervision, inspection or control whatever by the Railway Company, except only such inspection as may be necessary to enable the Railway Company to determine whether the work performed complies with the requirements of this contract, it being the intention of the parties hereto that the Contractor shall be and remain an independent contractor and that

Defendant's Exhibit No. 42—(Continued)

nothing herein contained shall be construed as inconsistent with that status."

Said agreement of July 18, 1936, as hereby altered and amended shall continue in full force and effect between the parties.

In Witness Whereof the parties hereto have caused this supplemental agreement to be executed the day and year first above written.

Northern Pacific Railway Company
H. E. Stevens, Vice President
Addison Miller Company
A. T. Miller

Supplemental agreement made this 30th day of October, 1942, between the Northern Pacific Railway Company, hereinafter called the "Railway Company", and Addison Miller Company, hereinafter called the "Contractor".

The Railway Company entered into an agreement with Addison Miller Incorporated, dated July 18, 1936, providing for the maintenance and operation of an ice plant at Yardley, Washington. Said agreement with the consent of the Railway Company, by instrument dated April 20, 1937, was assigned to the Addison Miller Company. Said agreement was altered and amended by supplemental agreement dated January 24, 1938, and the parties desire to further alter and amend said agreement.

Now Therefore, in consideration of the premises it is agreed by and between the parties hereto that said agreement of July 18, 1936, as altered and

Defendant's Exhibit No. 42—(Continued)

amended by supplemental agreement of January 24, 1938, shall be and the same is hereby altered and amended in the following respects:

1. By terminating said supplemental agreement of January 24, 1938, effective as of February 28, 1942.

2. By striking paragraph V from said agreement of July 18, 1936, and substituting in lieu thereof the following:

"V"

"The Railway Company agrees to pay the Contractor in each calendar year for all services hereinbefore enumerated and for electric power used in the operation of the plant including ice storage rooms, at the following rates:

(a) Three Dollars ($3.00) per ton for the first 5000 tons of ice placed in bunkers or bodies of cars and Ninety-five cents (95c) for each ton of ice so placed in excess of 50,000 tons.

(b) Twenty-five cents (25c) per one hundred (100) pounds of salt placed in bunkers of cars.

(c) The actual amount paid by the Contractor for electric power and current used in the operation of said ice plant including ice storage rooms.

(d) One and 50/100 Dollars ($1.50) per ton for all ice left in storage on termination of the agreement."

3. By striking paragraph VIII from said agreement of July 18, 1936, and substituting in lieu thereof the following:

"VIII"

"It is understood and agreed that the payments

Defendant's Exhibit No. 42—(Continued)

provided for in item (a), Paragraph V hereof, are based on the present rates paid for labor by the Contractor and that such rates may fluctuate with changes in the rate paid common labor by the Railway Company in the vicinity of Yardley, Washington. The present rate paid common labor by the Railway Company is 56c per hour. Should the 56c per hour paid common labor by the Railway Company be increased 10% or more, with the result that the Contractor is required to increase in the same proportion rates paid for labor, or should the present rate of 56c per hour paid common labor by the Railway Company be reduced 10% or more thereby enabling the Contractor to reduce in the same proportion rates paid labor, the parties shall agree upon such change in the amount to be paid under item (a) of Paragraph V hereof, as shall fairly and justly correspond with such change in rates paid for labor by the Contractor."

4. By striking Paragraph XV from said agreement of July 18, 1936, and substituting in lieu thereof the following:

"XV"

"This agreement shall become effective on March 1, 1942, and shall continue in force for a period of one year, and from year to year, thereafter, unless terminated by either party by written notice served on the other on or before November 15, 1943, or on or before November 15th of any succeeding year, of its intention to terminate the agreement as of December 31 of that calendar year.

Defendant's Exhibit No. 42—(Continued)

On the termination of the agreement said ice plant shall be turned over to the Railway Company in good current operating condition."

Said agreement of July 18, 1936, as hereby altered and amended shall continue in full force and effect between the parties.

In Witness Whereof, the parties hereto have caused this agreement to be executed upon the day and year first hereinabove written.

Northern Pacific Railway Company
By H. E. Stevens, Vice President
In Presence of: E. L. Ledding, J. L. Larson.
Addison Miller Company
By Addison Miller,
In Presence of: M. J. Schiffer, T. H. Collins.

Supplemental Agreement made this 24th day of January, 1938, between the Northern Pacific Railway Company, hereinafter called the "Railway Company", and Addison Miller Company, hereinafter called the "Contractor."

The Railway Company entered into an agreement with Addison Miller Incorporated, dated July 18, 1936, providing for the maintenance and operation of an ice plant at Yardley, Washington. Said agreement, with the consent of the Railway Company, by instrument dated April 20, 1937, was assigned to Addison Miller Company, and the parties hereto now desire to alter and amend said agreement.

Now Therefore, in consideration of the premises

Defendant's Exhibit No. 42—(Continued)

it is agreed by and between the parties hereto that said agreement of July 18th, 1936, shall be and the same is hereby altered and amended in the following respects:

A. By striking Paragraph V, and substituting in lieu thereof the following:

"The Railway Company agrees to pay the Contractor in each calendar year for all services hereinbefore enumerated and for electric power used in the operation of the plant including ice storage rooms, at the following rates:

(a) Two and 75/100 Dollars ($2.75) per ton for the first 5000 tons of ice placed in bunkers or bodies of cars and Seventy cents (70c) per ton for each ton of ice so placed in excess of 5000 tons.

(b) Twenty-five cents (25c) per one hundred (100) pounds of salt placed in bunkers of cars.

(c) The actual amount paid by the Contractor for electric power and current used in the operation of said ice plant including ice storage rooms.

(d) One and 50/100 Dollars ($1.50) per ton for all ice left in storage on termination of the agreement."

B. By striking Paragraph VIII, and substituting in lieu thereof the following:

"It is understood and agreed that the payments provided for in item (a), Paragraph V hereof, are based on the present rates paid for labor by the Contractor and that such rates may fluctuate with changes in the rate paid common labor by the Railway Company in the vicinity of Yardley, Washing-

Defendant's Exhibit No. 42—(Continued)

ton. The present rate paid common labor by the Railway Company is 44c per hour. Should the rate of 44c per hour paid common labor by the Railway Company be increased 10% or more, with the result that the Contractor is required to increase in the same proportion rates paid for labor or should the present rate of 44c per hour paid common labor by the Railway Company be reduced 10% or more thereby enabling the Contractor to reduce in the same proportion rates paid labor, the parties shall agree upon such change in the amount to be paid under item (a) of Paragraph V hereof as shall fairly and just correspond with such change in rates paid for labor by the Contractor."

C. By striking Paragraph XV, and substituting in lieu thereof the following:

"This agreement shall become effective on January 1, 1938, and shall continue in force for a period of one year, and from year to year thereafter, unless terminated by either party by written notice served on the other on or before November 15, 1938, or on or before November 15th, of any succeeding year, of its intention to terminate the agreement as of December 31 of that calendar year.

On the termination of this agreement said ice plant shall be turned over to the Railway Company in good current operating condition."

Said agreement of July 18, 1936, as altered and amended by this supplemental agreement, shall continue in full force and effect between the parties.

In Witness Whereof, the parties hereto have

Defendant's Exhibit No. 42—(Continued)

caused this agreement to be executed upon the day and year first hereinabove written.

Northern Pacific Railway Company
By H. E. Stevens, Vice President
In Presence of: E. L. Ledding, R. D. VanVoorhis.

Addison Miller Company
By Addison Miller
In Presence of: Mary Dempsey, Myrtle M. Swanson.

For value received we hereby assign and transfer to Addison Miller Company that certain contract between the Northern Pacific Railway Company and the undersigned, dated July 18, 1936, as amended and supplemented, covering the operation of ice plant located at Yardley, Washington, together with all our rights and interests therein, this assignment and transfer to take effect as of May 1, 1937.

In Witness Whereof the said Addison Miller, Incorporated has caused these presents to be executed this 20th day of April, 1937.

[Seal] Addison Miller, Incorporated
By Addison Miller, President

In consideration of the consent of the Northern Pacific Railway Company to the foregoing assignment, Addison Miller Company, a partnership, hereby assumes each and all of the obligations of said contract of July 18, 1936, from and after the

Defendant's Exhibit No. 42—(Continued)

first day of May, 1937, with any endorsements or supplementary agreements relating thereto prior to the date hereof, and covenants and agrees to observe and perform and be bound by each and all of the terms, covenants and conditions of said agreement from and after the first day of May, 1937, in all respects as if it had been therein named as the Contractor.

In Witness Whereof I have hereunto set my hand and seal as of the 20th day of April, 1937.

Addison Miller Company
By Addison Miller, Co-Partner

Signed in the presence of: L. J. Schiffer.

In consideration of the foregoing agreement by Addison Miller Company, the Northern Pacific Railway Company hereby consents to the above assignment, with the understanding that Addison Miller, Incorporated is not relieved from the obligations of said contract of July 18, 1936, as amended and supplemented, with respect to matters arising out of the performance of said contract prior to the first day of May, 1937.

Northern Pacific Railway Company
By H. E. Stevens, Vice President

Agreement made this 18th day of July, 1936, between Northern Pacific Railway Company, hereinafter called Railway Company, and Addison Miller, Incorporated, hereinafter called Contractor.

The Railway Company has evidenced its intention

Defendant's Exhibit No. 42—(Continued)

to purchase from the Contractor, effective as of January 1, 1937, the Contractor's interest in certain land, together with the building thereon and car icing platform, ice manufacturing machinery and appurtenant facilities, hereinafter referred to as "ice plant", located at Yardley, Washington, as indicated in red on the blue print marked Exhibit "A", hereto attached and made a part hereof.

The Railway Company desires the Contractor to maintain and operate said ice plant for the purposes hereinafter provided.

Now Therefore, in consideration of the promises and mutual dependent covenants and agreements hereinafter contained, the parties agree as follows:

I.

The Contractor shall operate, at its sole cost and expense, said ice plant, and shall manufacture and store ice in such quantities as the Railway Company shall from time to time direct. The Contractor shall not be required to manufacture and deliver more than fifteen thousand (15,000) tons of ice in any one year, and shall have in storage on August 1st of each year not less than twenty-seven hundred (2700) tons of ice, unless notified by the Railway Company, in writing on or before the 1st day of June, that a lesser amount will be required.

II.

The Contractor shall, as and when directed by the Railway Company, place ice in bunkers or

Defendant's Exhibit No. 42—(Continued)

bodies of cars set at the car icing platforms shown on Exhibit "A". The icing of cars shall be performed in such manner and in accordance with such rules and regulations as may be issued from time to time by the Railway Company.

III.

The Contractor, at its own sole cost and expense, shall maintain said ice plant and make such reasonable replacements and renewals as may become necessary for the continued efficient operation of the plant.

IV.

The Railway Company shall furnish salt in cars and the Contractor shall unload, store and place same in bunkers of cars as and when directed by the Railway Company.

V.

The Railway Company agrees to pay the Contractor in each calendar year for all services hereinbefore enumerated, upon the basis of ice furnished and salt handled per annum, at the following rates:

(a) Two and 50/100 Dollars ($2.50) per ton for all ice placed in bunkers or bodies of cars.

(b) Twenty-five cents (25c) per one hundred pounds for all salt placed in bunkers of refrigerator cars, said amount to cover services in unloading and storing salt.

VI.

Subject to the approval of the Railway Company, the Contractor shall be permitted to make additions

Defendant's Exhibit No. 42—(Continued)

and betterments in said ice plant in the interest of providing more efficient and economical operation, and the cost of such additions and betterments, when so approved, shall be paid for by the Railway Company upon presentation and audit of bills covering the cost thereof.

VII.

A ton of ice whenever used in this agreement shall mean a ton of two thousand (2,000) pounds, and for the purpose of determining payments hereunder, the amount of ice placed in bunkers of cars shall be determined in accordance with the provisions of Circular 128-L, and revisions thereof as may be made from time to time, issued by the General Superintendent of Transportation of the Railway Company, covering dimensions and capacities of ice bunkers of railroad and private line refrigerator cars; and for ice placed in bodies of cars, the amount of ice shall be based on average weight of cakes of ice at time of loading.

VIII.

It is understood and agreed that the payments herein specified are based on the present schedule of rates for electric current and power to be paid by the Contractor, which schedule of rates is hereunto annexed, marked Exhibit "B", and made a part hereof, and upon the present rates for wages for common labor paid by the Railway Company in the vicinity of Spokane. It is understood that the present rate of wages for said common labor now

Defendant's Exhibit No. 42—(Continued)

is thirty-nine cents (39c) per hour, and that the payments specified in paragraph V hereof shall continue in effect so long as schedule of rates now being paid by the Contractor for electric current and power and the rate of thirty-nine cents (39c) per hour for said common labor remain in effect within ten per cent (10%) of said present rates. Should said schedule of rates for electric current and power be hereafter changed, or should the rate of thirty-nine cents (39c) per hour for said common labor hereafter change ten per cent (10%) or more from the rate now in effect, the parties hereto shall thereupon agree upon such change in the amount to be paid for the services rendered hereunder as will fairly and justly correspond with such change.

IX.

Monthly settlement will be made with the Contractor upon check and approval of the bills for service rendered during the preceding month.

X.

The Contractor shall furnish to the Railway Company such records and statements as it may reasonably require in respect to the services rendered hereunder, and the Railway Company may at all reasonable times inspect all the books and records of the Contractor in any way pertaining to this contract.

XI.

If the Contractor shall fail to deliver to the Rail-

Defendant's Exhibit No. 42—(Continued)

way Company the quantities of ice as hereinbefore provided, for any reason other than fires, floods, strikes, riots, or accidents to the plant and facilities, and shall continue to fail to so deliver ice for a period of ten (10) days after written demand to deliver ice shall have been made upon it by the Railway Company, then and in that event the Railway Company may, at its option, obtain ice from other sources or purchase from others at the lowest prices obtainable such quantities of ice as may be required at Yardley up to the amount of the maximum specified in Paragraph I hereof, until such time as the Contractor shall notify the Railway Company of its ability to resume delivery according to the terms of this contract, and the Contractor shall, within thirty (30) days after receiving bill therefor, pay the difference between the amount expended by the Railway Company in procuring ice and the amount which would have been paid for the same quantities of ice if furnished under this agreement. If such failure on the part of the Contractor shall be due to fires, floods, strikes, riots, or accidents to the plant and facilities, the Contractor and the Railway Company shall be released from their respective obligations under paragraphs I and II hereof.

XIII.

The Railway Company shall furnish to the Contractor free transportation over its lines for all material and equipment necessary in the operation of the said ice plant, and shall also furnish free to

Defendant's Exhibit No. 42—(Continued)

the Contractor a reasonable amount of transportation for its employees, to be used only in connection with and when engaged in the performance of this contract.

XIV.

Any question hereafter arising under or touching the construction of this contract or any part thereof, or concerning the business or the manner or mode of transacting the business to be carried on under the provisions hereof, or the observance or performance of any of the conditions hereof, upon which the parties shall not agree, shall be submitted to the arbitrament of three competent disinterested persons. The party demanding such arbitration shall give to the other party notice of such demand stating specifically the questions to be submitted for decision, and nominating a person who has the desired qualifications to act as one arbitrator. If at the expiration of thirty (30) days from the receipt of such notice the party receiving it has not notified the party demanding such arbitration of its nomination of a second arbitrator having such qualifications, the party making the demand may make such selection. The first and second arbitrators chosen shall select a third. If the arbitrators chosen shall be unable to agree upon a third arbitrator, such third arbitrator may be appointed upon ten (10) days' notice upon motion of either party to a Judge of the District Court of the United States for the District of Washington. When the board is complete, the arbitrators shall

Defendant's Exhibit No. 42—(Continued)

fix a day and place for the hearing of which the parties shall be severally notified. The decision of the majority of the arbitrators shall, when stated in writing and delivered to both parties, be binding and conclusive upon them, and each party hereby expressly agrees to be bound conclusively thereby, and to perform the conditions thereof, and to make immediately such changes in the conduct of its business or such payment or restitution as in and by such decision may be required of it. The books and papers of the parties, as far as they relate to any matters submitted to arbitration, shall be open to the examination of the arbitrators. The party against whom the award is made shall pay all the fees and expenses of the arbitration.

XV.

This agreement shall become effective on January 1, 1937, and shall continue in force for a period of one year, and from year to year thereafter, unless terminated by either party by written notice served on the other on or before November 15th, 1937, or on or before November 15th of any succeeding year, of its intention to terminate such contract effective as of December 31st of that calendar year. Upon the effective date of the termination of this contract, the Railway Company will pay at the rate of One and 50/100 Dollars ($1.50) per ton for ice tonnage manufactured by the Contractor that may then be in storage at said plant. On the termination of the contract the plant and all ap-

Defendant's Exhibit No. 42—(Continued)

purtenant facilities shall be turned over to the Railway Company in good current operating condition.

XVI.

It is agreed that the Contractor shall not assign this contract or any interest therein without the written consent of the Railway Company, nor shall a receiver or trustee in bankruptcy, or other assignee of the Contractor by operation of law, assign this agreement without such written consent.

XVII.

Except as herein otherwise provided, this agreement shall inure to the benefit of and be binding upon the successors and assigns of both the parties hereto.

In Witness Whereof, the parties hereto have executed these presents the day and year first above written.

Northern Pacific Railway Company
By H. E. Stevens, Vice President
In Presence of: J. R. Ulyatt.

Addison Miller, Incorporated
By Addison Miller, President
In Presence of: L. J. Schiffer.

Defendant's Exhibit No. 42—(Continued)

EXHIBIT B

The Washington Water Power Company
Spokane, Washington

Schedule 42
Primary Power and Light (Non-Regulated)
Alternating Current

Classification:
This rate applies to all commercial power when service is used for power and incidental light, the supply being 3-phase, 60-cycle, alternating current at 2300, 6600 or 13,200 volts (at the Company's option) from regular non-regulated power feeders. The customer furnishes and maintains any transformers and regulators required.

Rate:

First 50 K.W.H. per K.V.A. of demand per month at 3c per K.W.H.

Next 100 K.W.H. per K.V.A. of demand per month at 1.5c per K.W.H.

Next 250 K.W.H. per K.V.A. of demand per month at 1c per K.W.H.

Over 400 K.W.H. per K.V.A. of demand per month at 0.7c per K.W.H.

Subject to the following Quantity Discount based on the monthly bill:

1st: $200.00—net $200.00.

3rd: $100.00—20% discount—net $80.00.

4th: $100.00—30% discount—net $70.00.

All over $400.00—40% discount.

Defendant's Exhibit No. 42—(Continued)

Determination of Demand:

The demand will be determined either by suitable indicating or recording instruments and will be expressed in kilovolt amperes.

Minimum Charge:

The minimum charge under this schedule will be $1.50 per K.V.A. of demand and in no event less than $50.00 per month.

Term:

The minimum term of contract will be one year.

Terms and Conditions of Service:

Any lighting must be taken from the phase or phases on which the demand measuring instruments are installed. For other terms and conditions see last sheet.

Filed: April 28, 1924.
Effective: April 29, 1924.
Applies to Spokane and Spokane Suburban.

Q. (By Mr. MacGillivray: Mr. Swanson, you made the statement that while lights on the top of the Addison Miller dock illuminated at night meant nothing down there at the Yardley yards, is that right? A. That's right.

Q. Are you speaking as of the present or as of prior to July 17, 1952?

Mr. Cashatt: I object to that, as to the present.

The Court: I'm sorry, I didn't get the question.

(The question was read.)

(Testimony of Ralph W. Swanson.)

The Court: In what respect?

(The preceding question was read.)

The Court: And then the next question, whether that was before or——

Mr. MacGillivray: Whether he is speaking of before or after that time.

The Court: Well, I think it should be confined to [802] the time of the accident and prior.

Q. (By Mr. MacGillivray): Are you speaking as prior to July 17, 1952? A. Yes.

Q. You did know from your experience as an ice foreman out there that the white lights were illuminated at any time that anyone was working on top of the salt dock or in the salt pit immediately adjacent to Track 13, or unloading salt or icing cars on doing any work on or around that dock at night connected with the icing operations, did you not? A. Yes.

Q. And from your experience at night when the white lights were on, the probable indication, at least, was that some type of work was going on at and around that dock?

A. Yes, or someone was on the dock.

Q. Pardon?

A. Or someone was on top of the dock.

Mr. MacGillivray: That is all. [803]

Redirect Examination

Q. (By Mr. Cashatt): Mr. Swanson, in any of your experience out there, was the loudspeaker that counsel has referred to, which is located west of

(Testimony of Ralph W. Swanson.)

the Addison Miller dock, ever used to warn Addison Miller employees of any switching?

Mr. MacGillivray: Are you speaking of prior to July 17, 1952?

Mr. Cashatt: That's right.

A. No, I don't believe it was ever used, not to my knowledge, in warning them of switching operations or anything like that.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. MacGillivray): Prior to July 17, 1952, was that loudspeaker system only used to warn and advise employees of the Northern Pacific?

A. I don't think that that was the purpose of the loudspeaker, as a warning.

Mr. McKevitt: You say what?

A. The loudspeaker, I don't believe, was put in for the purpose of warning anyone of approaching cars.

Q. (By Mr. MacGillivray): Well, isn't that one of the [804] purposes for which it was used prior to July 17, 1952, to advise and warn Northern Pacific employees?

A. No, I think it was for the yardmaster to relay work to his switchmen in the yards, or to have them come to the loudspeaker to talk to the yardmaster relative to movements in the yard.

Q. And you have never heard it used for any other purpose?

(Testimony of Ralph W. Swanson.)

A. No, not to my knowledge. As the present time, I can't think of when it was.

Q. Did you happen to be out there at the yards the night of June 23rd this year when some individuals were taking pictures out there in the yards?

Mr. Cashatt: I object to that, your Honor. That is going to open a field——

Mr. MacGillivray: That is subsequent to July 17th, I'm sorry.

That is all, Mr. Swanson.

The Court: Any other questions?

Mr. Cashatt: That is all.

The Court: That is all, then.

(Witness excused.)

Mr. Cashatt: Mr. Fincher. [805]

ROBERT C. FINCHER

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name is Robert C. Fincher? A. Robert C. Fincher, yes.

Q. And where do you reside, sir?

A. 1613 East Mallon.

Q. And were you employed by Addison Miller during 1952? A. Yes, sir.

Q. And how long had you worked for Addison Miller prior to that time?

A. About 26 years.

(Testimony of Robert C. Fincher.)

Q. And will you please just speak up, Mr. Fincher, so everyone can hear?

A. Around 26 years.

Q. And on the night of July 17, 1952, about what time did you come back to the ice dock after lunch?

A. Around 7 or 7:15, 7:30. I don't just remember exact.

Mr. McKevitt: You are letting your voice drop and we can't hear.

A. I say around 7:15 or 7:30, I don't just remember the time.

Q. (By Mr. Cashatt): By the way, Mr. Fincher, were you [806] subpoenaed as a witness in this case? A. Yes, sir.

Q. By the defendant? A. Yes.

Q. Now, Mr. Fincher, when you came back to the dock at 7:15 or 7:30 on the evening of July 17, '52, did you put any men to work unloading salt from a box car? A. No, sir.

Q. Was there any boxcar on Track 13 containing salt to be unloaded at that time?

A. Not to my knowledge.

Mr. Etter: Just a minute, I am going to object to the form of that question. It is leading and suggestive and there are about three questions in one.

The Court: Well, I will let it stand.

Q. (By Mr. Cashatt): Now what time had you come on shift that day? A. Three o'clock.

Q. Had there been any salt car located on

(Testimony of Robert C. Fincher.)

Track 13 at any time between 3 o'clock in the afternoon and the time the Stintzi boy was injured?

A. No, sir.

Q. After coming back to the dock about 7:15 or 7:30 on that day, was there any work done concerning salt in any way? [807]

A. Yes, we were raising salt from the salt house up on to the dock and distributing it along the dock, but we wasn't unloading any salt.

Q. Now that operation that you have told us about, how many men did you have working on that operation?

A. Oh, there was between six and 7, five, somewhere along there. There was some using the trucks and some in the house below, and we have what we call a hoist and we have a gig, what we call the salt gig. The boys below puts it on the gig and we raise it up on to the dock. It is electric.

Q. Now were you working in that operation?

A. Yes, I was running the hoist.

Q. And where were you located?

A. On top of the dock.

Q. And where were the other men working on this salt operation located?

A. Well, they were partly under the dock in the salt house and some up on top distributing the salt up the dock.

Q. And you say there were some in the salt house? A. Yes, some down below.

Q. Where is the salt house in relation to where the gig that you were operating is located?

(Testimony of Robert C. Fincher.)

A. It is right under it. [808]

Q. Is the salt house all confined in the dock area itself?

A. Yes, it is right under the dock. There is two, we have two salt houses. One we call the east house and the west house.

Q. And then you say how many were down there? A. I don't just remember.

Q. Do you remember a boy by the name of Ray Idaho Davis that was down there? Was he down there?

A. Yes, I think he was working downstairs.

Q. In the salt pit? A. In the salt pit.

Q. And I believe you mentioned that you had some working with salt up on top of the dock. What were they doing?

A. We unloaded up there on hand trucks and wheel it along the dock, distribute it along the dock, so we could have it handy for the cars when they come in.

Q. And at that time, was anyone at any time between 7:15 and 7:30 and the time the Stintzi boy was injured, unloading any salt from a boxcar?

A. No, sir.

Q. Now did you instruct the Stintzi boy and two or three others to clean out the slush pit?

A. Yes, sir.

Q. And what instruction did you give them?

A. Well, I told them to clean it out, put it on the north [809] side of Track 13.

(Testimony of Robert C. Fincher.)

Q. Where were you when you gave that instruction?

A. Well, we was right by the pit where the slush comes in.

Q. Was that up on the dock or down by the slush pit? A. No, down by the pit.

Q. Down by the pit? A. Yes.

Q. Did you watch them as they started doing this work?

A. Yes, I watched them and seen them coming back through the cars and I warned them not to go through them cars. I told them they might get hurt, they might bump them cars and it would hurt them. I told them to go around.

Q. Did you see them going through cars?

A. They were just coming back with an empty bucket when I seen them.

Q. And what did you tell them?

A. I told them not to go through them cars, to go around the end of the cars.

Q. How many cars were on Track 13?

A. I think they would have to go around about two and a half. I don't think the third car was quite even with where they came out with the slush.

Q. You mean——

A. It might have been.

Q. ——to go to the east two and a half cars?

A. Two and a half car lengths, possibly three.

Q. At the time you put these boys to work carrying out this slush ice, did you put up any blue light on the west end of the dock on Track 13?

(Testimony of Robert C. Fincher.)

A. No, sir.

Q. What did you say? A. No.

Q. Was there a blue light burning on Track 13 at any time between the time you came back from lunch at about 7:15 or 7:30 and when the Stintzi boy was injured?

A. Not that I know of. See, we don't turn them lights on unless we are icing cars.

Q. Are you the one that has charge of turning on the light? A. Yes.

Q. When you are on shift?

A. When I am on shift.

Q. What is your job with Addison Miller and was it at that time? A. Foreman.

Q. I see.

Mr. Cashatt: That is all. [811]

Cross Examination

Q. (By Mr. Etter): You were up on top of the dock running the salt gig, is that it, when the Stintzi boy was hurt? A. Yes, sir.

Q. How long have you been a foreman out there, Mr. Fincher? A. Ten years.

Q. Beg your pardon? A. Ten years.

Q. Ten years. A. Yes, sir.

Q. Young Stintzi worked out there in 1950 when he was 15, didn't he?

A. I think he did, I ain't positive.

Q. Well, you remember that he worked out there, as a matter of fact, don't you?

A. He didn't say he was 15 years old.

(Testimony of Robert C. Fincher.)

Q. Well, I know, but he worked out there in 1950?

A. Yes, he worked there two different times.

Q. Well, was it 1950 when he worked there first?

A. I couldn't swear to that, no. It might have been '51.

Q. As a foreman, you have been running that ice dock how many years? A. Ten years. [812]

Q. Ten years as a foreman?

A. As a foreman.

Q. I see. And how many times every summer do you clean out the slush pit?

A. Well, I hardly ever clean it, that is generally done during the daylight hours.

Q. Beg your pardon?

A. That is done mostly during the daylight hours.

Q. Well, now, certainly you have had that slush pit cleaned up in the 10 years you have been the foreman running that dock, haven't you, Mr. Fincher? A. Well, not very many times.

Q. Well, how many times in 10 years?

A. Oh, I don't know, I wouldn't say I cleaned it over two or three times.

Q. In 10 years? A. Yes.

Q. That is your testimony. You have always been on the night shift, is that it?

A. Always been on the night shift.

Q. I see. So in about 10 years, your testimony is that your shift has cleaned it three times?

(Testimony of Robert C. Fincher.)

A. Possibly that many, maybe not that many.

Q. So when Gerry Stintzi and these boys cleaned it that night, that would be about the third time it had ever [813] been done under your direction?

A. Yes, I have an idea it was.

Q. Have you got any idea of how long it was before that that you had ever cleaned the slush out?

A. No, sir.

Q. When was the second time, if you remember?

A. Oh, I don't remember over that 10 years when it was.

Q. When you had these boys clean it that night, could you remember then the last time that you had ever done that? A. No, sir.

Q. You could not? A. No.

Q. Well, do you know that slush ice is taken out on other shifts by virtue of your acquaintance with the other foremen on other shifts?

A. Yes, it was generally taken out during the day.

Q. Well, how many times, ordinarily, does that slush pit require attention, some servicing or some emptying or whatever you might call it?

A. That is according to the season, according to how much ice is taken out. Maybe it won't be cleaned for three or four months.

Q. When is your busy season?

A. Well, from the last of July, or middle of July, to [814] about the middle of September.

Q. The middle of July to the middle of September, about two months? A. Yes.

(Testimony of Robert C. Fincher.)

Q. How many times is that cleaned out during that period of time?

A. Well, I don't know, I never cleaned it often enough to know.

Q. Well, do you know from the other foremen on the day crew?

A. It is according to how the ice is coming out and how much we are using. Sometimes it might be quite a little in there, and maybe it would go a long time there wouldn't be any.

Q. You haven't any idea, then, in your 10 years as a foreman out there running that ice dock, you haven't any idea how many times they clean that slush pit out on the daylight shift?

A. No, sir.

Q. You haven't got the least idea?

A. No, because maybe sometimes they would clean it—Now this time of year we never have to clean it, it melts itself. A little warm now, before we get busy, they don't have to clean it.

Q. Well, did it require cleaning on July 17th of 1952? [815]

A. Yes, when we get busy.

Q. What was the situation in that slush pit on July 17, 1952?

A. I don't just understand what you mean.

Q. Well, did it have a lot of slush ice in it, or did it have a little bit, or what was the situation?

A. Oh, it had not an awful lot. There was some in there.

Q. Well, how much did it have in there?

(Testimony of Robert C. Fincher.)

A. Well, that is hard to say.

Q. Well, you say not an awful lot; was it a bucket or two or three buckets or four buckets?

A. Oh, I have an idea——

Q. A gallon or half a gallon or a quart? Give us some idea.

A. Probably 10 or 12 buckets.

Q. 10 or 12 buckets?

A. Yes, maybe a little more.

Q. What size bucket?

A. Oh, gosh, I don't know.

Q. Well, what—— A. Holds about——

Q. Beg your pardon?

A. About a 5-gallon bucket.

Q. About a 5-gallon bucket?

A. Yes. [816]

Q. As a matter of fact, do you know the buckets that you use, are you acquainted with those, Mr. Fincher? A. Yes, but I don't know just——

Q. All right, is it a 5-gallon bucket?

A. Well, I don't know exactly how much it would hold, no.

Q. You have been out there 10 years, you don't know anything about how much this bucket holds?

A. No, we never measured what those buckets hold.

Q. Well, how do you measure when you put any ice in? Have you got any idea how much ice you put in these cars?

A. We don't use no buckets to put ice in the cars.

(Testimony of Robert C. Fincher.)

Q. How do you know how much ice you put in them? A. You go by the cake count.

Q. Do you know what a cake of ice weighs?

A. Yes, sir.

Q. How much does it weigh?

A. It weighs 400 pounds.

Q. How do you know it weighs 400 pounds?

A. Well, that is what it is supposed to weigh.

Q. You have been around there long enough to know, Mr. Fincher, haven't you? A. Yes.

Q. All right, this bucket holds 5 gallons?

A. I suppose about that.

Q. Yet you don't know whether there were 4, 10, or 12 [817] bucketfuls in there?

A. Yes, there might have been a little more.

Q. Well, would it be safe to say there was 60, 79, or 80 gallons of ice slush, is that correct?

A. Yes.

Q. Do you recall how far up toward the chain, that is, the conveyor chain, the ice slush had worked at the time you asked or ordered these boys to clean it out?

A. Well, it don't really work up under the chain very much, it rolls out away from the chain mostly, just come up to a little pile on the chain.

Q. I see. Where did you first see these boys, Mr. Fincher? Where were they when you ordered them to do this work?

A. Well, they went with me over from the plant, the plant where we eat lunch——

Q. Just a minute. Did you eat lunch with them?

(Testimony of Robert C. Fincher.)

A. No, but I eat at the same time.

Q. You eat at the same time?

A. Then we go over from the ice house, not right at the ice dock.

Q. All right, who came over from the ice house after you had lunch? Who were you with?

A. Oh, I had about 10 or 15 men with me. I don't just remember exactly how many.

Q. 10 or 15 men? [818] A. Yes.

Q. They were all with you as you came back through the tunnel?

A. Yes, through the tunnel.

Q. All right, when you came through the tunnel and started up the stairs, did you go up to the top of the icing dock?

A. No, I sent some of them up there and some around into the salt house.

Q. I gather, then, that you stopped——

A. Yes.

Q. ——down by the slush pit?

A. Told some of them to clean out the slush.

Q. Well, not to go too fast, you stopped by the slush pit? A. Yes.

Q. Is that right? A. Yes.

Q. All right, were all these 15 men standing around there?

A. No, sir, some of them went on up on the dock.

Q. Well, did you send them up there?

A. Yes.

(Testimony of Robert C. Fincher.)

Q. What did you tell the ones to do that were going up on the dock?

A. I told them, I said part of us would put up salt and the other part would clean the slush. [819]

Q. All right, who did you tell to clean the slush?

A. Well, I didn't pick out any particular ones, I just——

Q. What did you say?

A. I says, "Four or five of you clean this slush and the rest of us will go put up salt."

Q. Well, who was standing around when you said that?

A. Oh, I don't know who it was.

Q. Beg your pardon?

A. It is hard to remember just who all was around there at that time. That was two years ago.

Q. All right, who did clean the slush out, then?

A. Well, the Stintzi boy and a fellow by the name of Maine and one by the name of Johnson, and another one or two started, but I don't know just what their names were.

Q. Do you know Joe Vallarano?

A. I wouldn't know him if I seen him, I don't think.

Q. Do you know John Tarnasky?

A. No, sir. I might know him, but not know him by name.

Q. You don't know, then, who you told to clean the slush out?

A. No, I just told that certain bunch that was there to clean it out.

(Testimony of Robert C. Fincher.)

Q. How do you remember that you told Maine?

A. Well, because him and Stintzi generally worked together. [820]

Q. You didn't know Allan Maine, did you?

A. Well, yes, I knowed he was working.

Q. You knew he was working there, he had been there about a week?

A. I don't know just how long.

Q. And you haven't seen him since the 17th, have you? A. Not to talk to him.

Q. Well, where have you seen him otherwise?

A. I think I have seen him in here.

Q. But until this trial, have you seen Allan Maine any place? A. No, sir.

Q. But you remembered him when you saw him here? A. Yes, I think so.

Q. Beg your pardon? A. Yes.

Q. But you don't remember Joe Vallarano?

A. Yes, I kind of remember him, yes. I think I might know him if I seen him.

Q. Well, didn't he work on that slush cleaning?

A. I think he did.

Q. And John Tarnasky, do you remember a Canadian that was working there for you?

A. No, there is so many work there that it is hard to remember them. [821]

Q. A lot of high school kids?

A. Not so many, but then there is a few high schools kids and lots of other men.

Q. All right, now, did you just say to a lot of fellows that were there, "Some of you go ahead and

(Testimony of Robert C. Fincher.)

clean out this slush, and some of you do such and such?" A. Yes, sir.

Q. Did you tell Gerry Stintzi to clean out slush?

A. I don't remember whether I mentioned his name or not.

Q. Did you tell Allan Maine to clean out any——

A. I couldn't swear that I told him.

Q. You don't remember that you told any separate individuals?

A. Not certain ones, no. I just says, "Some of us will clean out the slush and some will put up the salt."

Q. Well, now isn't it the fact, Mr. Fincher, that what you did, you said, "Young Stintzi"—you knew him and you said, "you get yourself a few men and go down and clean out the slush bucket," didn't you say that, or "the slush pit?"

A. I don't know as I did, I might have.

Q. Well, isn't it a fact when you said that, you were up on the ice dock, you weren't down in the slush pit at all?

A. No, sir, I didn't go up on the dock 'til afterwards. [822]

Q. You didn't go up on the dock?

A. Not right away.

Q. All right, then, when you said, "Go ahead and clean out the slush pit," how many men started working at it?

A. I believe there was five or six, now I couldn't swear which.

(Testimony of Robert C. Fincher.)

Q. All right, tell us what they did. Tell us the operations you saw.

A. Well, one of them got down in the pit with the shovel and filled the bucket and handed it up to the boys to carry out.

Q. All right, and did you tell the boys what they should do with the slush?

A. I told them, yes, told them where to put it.

Q. Where did you tell them to put it?

A. Across the tracks.

Q. Across the track? A. Yes.

Q. You told them to take it across the track; are you referring to Track No. 13?

A. 13, yes.

Q. And where did you tell them to dump it, over north of Track 13? A. Yes.

Q. Why did you tell them to dump it there?

A. Well, that is a kind of a cleanup and trash track and where they clean cars and everything, so we was just in the habit of throwing our stuff there.

Q. Throwing paper and everything else there, isn't that right? A. Yes.

Q. That has been used as a trash dumping place for the 10 years you have been there, isn't that so?

A. Yes, sir.

Q. And your salt sacks are dumped over there, the paper ones, aren't they?

A. The paper ones, yes.

Q. Yes. And you have dumped other refuse over there that you have in those cars, isn't that so?

(Testimony of Robert C. Fincher.)

A. No, we never clean no cars.

Q. No, but any refuse you find or that you are using in your operation, your paper sacks and your ice and stuff, you dump it over there?

A. Yes, we do.

Q. Isn't that right? A. Yes.

Q. And had been during the time you have been working there for 10 years, isn't that right?

A. Yes.

Q. Now at the time you told them to go north and dump it, [824] did you tell them anything else, Mr. Fincher?

A. I don't remember that I did.

Q. Then what happened? Who took out the first bucketful?

A. I believe Stintzi and Maine took the first buckets.

Q. Took the first buckets? A. Yes.

Q. How long did it take them to fill the bucket up?

A. Oh, just three or four scoop-shovelfuls, as quick as you could scoop it up and put it in the bucket.

Q. It was full and they started out with it, is that right? A. Yes.

Q. Did you follow them?

A. No, I had been somewhere else, I come back, and they had already emptied the bucket.

Q. Oh, they had emptied the bucket?

A. Yes.

(Testimony of Robert C. Fincher.)

Q. Where did you see them? Did you see them start out the door with the bucket?

A. No, I didn't.

Q. Well, when was the last time you saw them with the bucket?

A. They were coming back. They had emptied the bucket and were coming back and climbing through the cars, and I told them not to do that.

Q. Oh, just a minute. They were coming back, where were [825] you when they were coming back?

A. I was right at the end of where they go outside.

Q. Where they were to go outside?

A. No, where they step outside after they go up the stairs.

Q. All right. Mr. Fincher, directing your attention to Plaintiff's Exhibit No. 7, looking into an entrance, is that the entrance that you have reference to? A. Yes.

Q. Where were you standing, sir?

A. I was right in here somewhere (indicating).

Q. You were right there?

A. Yes. They were coming—as they come through the cars.

Mr. McKevitt: Louder, please.

Mr. Etter: A little louder.

Mr. McKevitt: Can't hear you.

A. As they come through the cars, I was standing there as they came through and started down there, and that is where I saw them.

(Testimony of Robert C. Fincher.)

Q. (By Mr. Etter): How long had you been standing there?

A. Oh, I don't know, I think I just come out of the salt house.

Q. You had just come out of the salt house, you think? A. Yes.

Q. You had been down there, you believe? [826]

A. To show the other boys where the salt was I wanted up on the dock.

Q. And what had you been doing before you went to the salt house?

A. I don't know just what you mean by that question.

Q. Well, what had you been doing? I mean, you apparently were giving these boys instructions on what to do, isn't that right? A. Yes.

Q. And you saw them fill one bucket?

A. No, I didn't see them fill the bucket.

Q. You didn't wait, you just told them what to do and took off? A. I went out.

Q. Where did you go? Did you go out this door that you have talked about?

A. I went out this door——

Q. Beg your pardon?

A. ——to the salt house.

Q. You went down to the salt house?

A. Yes. It is right beyond that door.

Q. You came back——

A. As I came back, they were coming back with the empty bucket they had.

(Testimony of Robert C. Fincher.)

Q. They were coming back with the empty bucket? [827] A. Yes.

Q. Where did you first see them?

A. Right there at the end as they come through the cars.

Q. As they came through the cars?

A. Yes.

Q. And tell us how they came through the cars.

A. Well, I don't just remember how they did, whether they come under them.

Q. Beg your pardon?

A. I don't just remember exactly how they come through. I seen they were going between them and I told them not to.

Q. You saw both of them come under the coupling?

A. No, I didn't see them. They were coming out from between the cars when I seen them. Whether they went under the coupling or over it, I couldn't swear to that.

Q. But both of them came out together?

A. Now I ain't sure whether they both come out or whether one was already out when I seen them.

Q. Who was carrying the bucket?

A. I don't remember that, either.

Q. Was one or the other, or were they both carrying the bucket?

A. Might have been both carrying it, I don't just remember. [828]

Q. All right, and then did you have a conversation with them? A. Yes.

(Testimony of Robert C. Fincher.)

Q. All right, tell us what you said and what they said.

A. I just told them not to go through them cars; that they might drop some cars in there and they would get hurt. And I don't just remember what they said, whether they said anything back or not.

Q. Well, when you started the boys out on this job, did you see them go between these cars?

A. No, they were coming back when I seen them.

Q. I see. You didn't see them go between any cars?

A. I didn't see them go between them going over there when they emptied the bucket, no.

Q. And you didn't see them come between them when they came back, is that it?

A. They were just coming out from between the cars when I seen them. I forget which one, whether they both was coming through there or just one.

Q. When you spoke to them about coming through the cars, did you say, "You shouldn't come under the cars," is that what you told them?

A. I don't remember my exact words, but——

Q. What did you tell them to do with the slush then?

A. I told them to go around the end of the cars.

Q. You told them to go around to the end of the cars? A. Yes.

Q. What did they say?

A. I don't remember just what they said.

Q. I see.

A. Whether they said they wouldn't or not.

(Testimony of Robert C. Fincher.)

Q. I see. How long was this after you had given them their first instructions that you saw them? Almost immediately after that? A. No.

Q. How soon after you instructed them down in the ice room or where the slush was to go out and take this slush out, how soon was it that you saw them this first time coming back that you are talking about?

A. Oh, it wasn't very long. I couldn't say just how many minutes.

Q. Well, do you know how many buckets they had carried or anything like that?

A. No, I think it was the first bucket, but I wouldn't swear to it.

Q. You think it was the first bucket?

A. Yes.

Q. And you then told them—what did you tell them to do? Did you give them some other instructions?

A. I told them not to go through them cars, to go around [830] them cars.

Q. Not to go through the cars, but to go around them? A. Yes, to go around them.

Q. All right. What did they say?

A. I don't remember just what they said.

Q. All right. Well, then, what did you do then after you gave them the instructions? This is right in front of the shed, I gather, that you talked about?

A. Well, I went on up and started running the hoist.

(Testimony of Robert C. Fincher.)

Q. You started running the hoist of the salt gig, is that right?

A. I had to go up on top of the dock to do that.

Q. I see. Did you see either Gerry Stintzi or this other boy, Allan Maine, again?

A. What was the question?

Q. Did you ever see them again that evening?

A. Oh, yes, I seen him after he was hurt.

Q. After he was hurt?

A. And talked to Maine, talked to the Maine boy.

Q. But between the time that you saw them coming through the cars the first time and the time that the boy was hurt, you didn't see them again?

A. No, where you run the hoist is kind of boarded up. You stand in there, well, there is a window out on the north side that you can look out.

Q. Well, Mr. Fincher, isn't it the fact that you didn't warn these boys at all and you never ever saw them coming back under the coupler?

A. It is a fact that I did see them coming back and I warned them.

Q. And that happened right when they started the work, is that it?

A. Yes, sir, right just about that time.

Q. Did you tell them when you directed them to do the work, did you tell them right at that time not to go between the cars?

A. No, sir, I told them after I seen them coming back through the cars.

Q. In other words, you didn't tell them how——

(Testimony of Robert C. Fincher.)

A. Before I went out there, I didn't know that there were any cars there.

Q. I see.

A. You had to go out there first to see whether there is any cars there.

Q. You say you didn't know there was a string of cars out there?

A. No, sir, not until I went out.

Q. Not until you went out?

A. No, how would I know?

Q. And as I gather it, after you gave these boys their [832] instructions, you went down to the salt house and then you came back and saw them coming out from between the cars, and it wasn't until then that you went up and started to run the salt gig? A. Yes, sir.

Q. Is that right? A. That's right.

Q. And what time was that?

A. Well, it was between 7:30 and 8 o'clock, I imagine. I don't remember just exactly the time.

Q. It was between 7:30 and 8 o'clock? A. Yes.

Q. And it was about an hour later that this boy was injured, wasn't it?

A. I don't know whether it was an hour or not quite.

Q. Well, it was three-quarters of an hour, wasn't it 8:15?

A. It might have been, it was sometime after 8 o'clock.

Q. Sometime after 8 o'clock? A. Yes.

Q. Three-quarters of an hour?

(Testimony of Robert C. Fincher.)

A. Just getting dusk.

Q. Beg your pardon.

A. It was just getting dusk.

Q. What time do you turn the lights on up there, Mr. Fincher? [833]

A. Well, just as quick as it gets dark.

Q. All right, when did you turn them on that night?

A. Well, I don't remember just exactly when we turned them on.

Q. Well, where do you turn them on at?

A. To turn the lights on 13, you have to walk up the dock to the center of the dock.

Q. To turn them on where?

A. To turn them on the north side of the dock. But on the south side, you can turn them on right from this end.

Q. All right, when did you turn the lights on?

A. I don't remember what time I turned the lights on.

Q. Now you don't recall, then, what time you turned the lights on or on which side, is that idea?

A. Well, we turn them on 12 first when we turn the lights on.

Q. You turned the lights on on 12; what was going on on 12? A. Nothing.

Q. Well, how many cars were there along 12?

A. I don't think there were any.

The Court: We will suspend now until 9:30 tomorrow morning. Remember, we will come back again at 9:30 tomorrow morning. We will be ready

(Testimony of Robert C. Fincher.)

for you in the morning, I'm sure, won't keep you sitting around. [834]

Court will adjourn until tomorrow morning at 9:30.

(Whereupon, the trial in the instant cause was adjourned until 9:30 o'clock a.m., Friday, July 2, 1954.) [835]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

ROBERT C. FINCHER

having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Etter): Mr. Fincher, on the evening of July 17th of 1952, do you remember when it was that any lights were turned on on the icing dock? I have reference now to the overhead illuminating lights.

A. No, I don't just know what time they were turned on.

Q. You don't know?

A. No, not exactly.

Q. Do you know who turned them on?

A. No, I don't.

Q. Beg your pardon? A. No.

Q. Do you have charge of that particular phase of the activity? [836]

(Testimony of Robert C. Fincher.)

A. No, anybody might come along and turn the lights on.

Q. At any time, is that—— A. Yes.

Q. Is that your testimony. Do you remember when they were turned on then?

A. No, I don't, not exactly.

Q. Do you remember when it became dusk out there? A. Well, along about 8:20.

Q. Along about 8:20?

A. After 8 it starts to get dusk.

Q. Well, ordinarily, if men are working out there on the ice dock or they are there for employment, is it customary to turn the lights on when it starts to get dark? A. Yes, sir.

Q. And is it your best recollection that the lights were on then at 8:20 or thereabouts?

A. Well, they might have been turned on about that time.

Q. Well, were the lights on, do you know?

A. I couldn't swear to that.

Q. Well, you were working over on the salt gig at that time, weren't you? A. Yes, sir.

Q. And were you working in the dark, would that be a fair statement, or were the lights on? Could you see what [837] you were doing?

A. Yes, I could see what I was doing.

Q. There were men working down in the salt pit, I think you said five or six or seven, you didn't know how many?

A. No. But they have their own lights down there in the salt pit.

(Testimony of Robert C. Fincher.)

Q. They have their own lights down there in the salt pit? A. Yes.

Q. But you were handling the salt up on the dock, isn't that correct?

A. I was running the elevator.

Q. You were running the elevator?

A. Yes.

Q. Bringing salt up and trucking it down the dock? A. Yes.

Q. And you don't know whether the lights were on, though?

A. Well, if it was dark enough, the lights were on.

Q. Well, was it dark enough? When did you customarily turn them on?

A. Well, just as quick as it starts getting dark, we will turn the lights on.

Q. Just as quick as it starts getting dark?

A. Yes.

Q. Would it be a fair statement, then, to say that in all [838] probability the lights were on?

A. Yes.

Q. Is that correct? A. On 12, not 13.

Q. Oh, not on 13? A. Not right away.

Q. Can you tell us why they weren't on on 13?

A. Well, we hardly ever, unless we are using Track 13, lots of times we don't turn the lights on on 13.

Q. You don't turn them on?

A. No, if we are just putting out salt or something, we just have lights on 12.

(Testimony of Robert C. Fincher.)

Q. Just have them on 12? A. Yes.

Q. Of course, you just iced a car or iced a train at 4 o'clock that you had split and put half on 12 and half on 13; isn't that right?

A. We wouldn't have the lights on at that time of day.

Q. I know but you had split the train on both tracks, isn't that right?

A. Well, they generally do.

Q. And your testimony is, then, that the lights were not on on Track 13?

A. That is what my best recollection is, no, I don't believe they were on on 13, but they probably were on 12. [839]

Q. Beg your pardon?

A. The lights on the south side of the dock, but I don't believe they were on the north side of the dock.

Q. It was on the north side of the dock, however, that you were carrying on practically all of the activities at the time of this accident, isn't that true?

A. No.

Q. What were you doing on the south side?

A. Well, the lights on the south side lights up the dock enough so you don't need the other lights on to be working on the dock.

Q. Well, what was the purpose of having them on at that time on the south side of the dock?

A. Well, we were trucking salt up the dock.

Q. But you were bringing salt up on the north side, isn't that right?

(Testimony of Robert C. Fincher.)

A. Well, yes, it is on the north side, but then——

Q. Your salt pit is on the north side?

A. The salt is right square under the center of the dock.

Q. In the center of the dock, but the pulley that brings it up is on the north side, isn't it?

A. Yes, it is—well, no, the end of the gig is just about the center of the dock. Where they take the salt off the elevator is right about the center.

Q. Well, now, I call your attention to Exhibit No. 9. [840] Over to the left on the north side, is that not the salt shed?

A. The salt shed where the salt is is under this (indicating). This is where it comes up, but they take the salt off here. That is pretty near the center of the dock.

Q. Were you——

A. This chain is in the center.

Q. Just a moment, please. Isn't the salt brought up on a chain, elevator-type, to this building right here (indicating)?

A. No, it is brought up, it is put on and hoisted up the cable.

Q. Hoisted up where, into this building (indicating)?

A. No, in the next building—no, between the two here (indicating).

Q. All right, between the two? A. Yes.

Q. But on the north side of the dock, isn't it?

A. Yes, but they have to take it off right there and that is about the center. That is where they

(Testimony of Robert C. Fincher.)

pull the salt off. They can't take the salt off either side.

Q. Well, take this No. 16, this is a view, of course, along on the north side. Now can you tell me what side of the dock that shed is on? [841]

A. That is on the north side.

Q. On the north side. And where is this opening in the salt shed?

A. That comes up just about the center of the dock.

Q. Center of the dock?

A. Pretty close, it is just to the left. That is where they take the salt off the hoist is right there (indicating).

Q. It is taken off the hoist right between these two buildings? A. Yes.

Q. Is that correct?

A. But it is taken out of the end, you can't take it off either side.

Q. Well, now, so we aren't quibbling here, isn't the operation carried on from the salt shed, the opening of which is on the north side, and the shed itself is on the north side of the dock?

A. The shed is on the north side of the dock.

Q. Isn't that correct? A. Yes, sir.

Q. As it appears in these two photographs. It isn't in the center at all, is it?

A. No, but the men stand almost in the center of the dock taking the ice off the elevator. [842]

Q. If this building, Mr. Fincher, were over here

(Testimony of Robert C. Fincher.)

by this light which appears on the south side, would you say it was in the center?

A. No, I didn't say the building is in the center, I say where the men working taking the salt off, they are working almost in the center of the dock.

Q. They are working in the center of the dock?

A. Yes.

Q. So the thing to do, then, you feel, is to have the lights on on the south side rather than the north side?

A. Well, we generally turn them on there, yes.

Q. In other words, when you work on the north side, you use the lights on the south side, is that the idea?

A. No, sir, we don't work—mostly the work was on the south side of the dock.

Q. All right, what was going on on the south side of the dock?

A. That is where they wheel the salt, on the south side.

Q. They wheel it down the south side?

A. Yes.

Q. You don't wheel any on the north side?

A. Yes, at times we do.

Q. Well, were you doing it this time?

A. I don't just remember whether we were putting any there at this time or not, but it is mostly on the south side. [843]

Q. You had a fruit train brought in to the icing dock at about 4 o'clock on the afternoon of the 17th, is that correct, sir?

(Testimony of Robert C. Fincher.)

A. I think it is, if I remember right.

Q. Well, do you remember?

A. Well, that is two years ago, I can't just remember exactly what time that train was there.

Q. Well, was it there sometime in the afternoon between 3 and 5?

A. Let's say that I suppose it was, yes.

Q. Well, was there a fruit train come along?

A. If the records show there was one, there was one there, yes.

Q. And how was that iced, Mr. Fincher, on what track or tracks?

A. Well, sometimes they split them and put part of them on 13, and other times they just pull them into the track and pull them straight ahead on the same track. There is different ways.

Q. What happened that day?

A. I don't just remember whether they split the train or whether they pulled it ahead.

Q. Do you know whether or not there was any icing operation on Track 13 that afternoon?

A. I couldn't swear that there was, no. [844]

Q. Do you know whether there was any on 12?

A. Yes, there was icing on 12.

Q. Of the whole train?

A. That time of the year we always have icers.

Q. Was the whole train on there?

A. I don't remember whether the whole train was there or not.

Q. Well, if you had a train of approximately 56 cars, could you put it all on that track for icing?

(Testimony of Robert C. Fincher.)

A. Now we ice about 28 at a time, then they may pull ahead, or they may come and set them over. It is just according to the yardmaster's orders.

Q. What did you do that day?

A. I don't just remember whether they was pulled or whether they was set over.

Q. Do you keep any records out there of where cars are iced or how they are iced, on what track they are iced?

A. No, but I think the railroad does. We don't keep no records, we just keep——

Q. You don't keep any records?

A. No, just what cars.

Q. You don't remember much of what happened that day?

A. Well, I don't remember everything that happened, no.

Q. Well, don't you remember whether you iced cars on Tracks 12 and 13? [845]

A. Well, I suppose we did, yes.

Q. Well, as a matter of fact, you know that you did, don't you?

A. I couldn't swear we iced any on 13.

Q. I see. When were you told or when were you informed that a fruit train was coming to be iced on the afternoon of July 17, 1952, if you were told?

A. Well, we generally get orders from the yard office an hour before train time.

Q. Hour before train time?

A. As a rule, how many cars is on the train to

(Testimony of Robert C. Fincher.)

be iced, and so on, and we try to have our ice on the dock in order.

Q. Do you get those orders from the superintendent?

A. We get them from the ice foreman.

Q. From the ice foreman? A. Yes.

Q. How does he give them to you?

A. Over the phone.

Q. Over the phone?

A. Sometimes, maybe, he will send a helper down and he tells us what is coming.

Q. And your testimony is that the ice foreman advises you of the arrival of a train?

A. Yes, he generally gives us—— [846]

Q. Does he tell you how many cars?

A. ——an hour's notice of how many cars and how many is to be iced.

Q. How many are to be iced? A. Yes.

Q. Does he tell you where the cars are going to be spotted?

A. Yes, he generally does, the train is going into the yard or into the dock.

Q. All right, does he tell you what track they are going to put them on? A. Yes, sir.

Q. How does he give you this order, over the phone orally or does he confirm it with a written instruction?

A. He gives that over the phone.

Q. He gives it to you over the phone?

A. Yes.

(Testimony of Robert C. Fincher.)

Q. Always calls up before the arrival of one of these trains?

A. Unless they slip in and he don't know anything about it, then they wouldn't, but if he knows a train is coming in. Once in awhile they come in without a call, other times they won't.

Q. Well, then, you have been out there, have you, when fruit cars, refrigerator cars, have slipped in there [847] without any word from the ice foreman?

A. Yes, sir. Once in awhile a train will come in ahead of time or something where you don't get no call on.

Q. They don't get any call and you don't get any call?

A. No. Of course, if they don't get one, why we don't have one.

Q. Certainly not. In other words, they just come in without either one of you knowing about it?

A. Sometimes they do that.

Q. That has happened a number of times since you have been the foreman up there?

A. Oh, not too many times, once in awhile.

Q. I see. And how is it you know that there is a bunch of fruit cars? They just bring them on in, is that the idea?

A. No, they come in the yard, well, then the ice foreman knows after they are in the yard whether they ice or not, then he phones to me and tells me.

Q. What I am talking about are these times where they slip a car or two for icing in there that

(Testimony of Robert C. Fincher.)

you haven't been told about and that the ice foreman apparently hasn't been told about.

A. Well, he will be told before them cars are there very long.

Q. Before they are where very long? [848]

A. In the yard any place. He knows whether they are going to be iced or not.

Q. In other words, then, your testimony, if I understand it, is that they may get into the yard without you or the ice foreman knowing it, but they never get up alongside your dock without your being informed?

A. No, they might set some in there before we are informed that they are to be iced, yes.

Q. Well, I would like to get it straight. I am trying to find out if any icing cars or refrigerator cars, whatever you want to call them, are ever put in on Track 12 or 13, or have been put in on Track 12 or 13, without notification to you beforehand?

A. Oh, yes, they are put in there lots of times, and then I am notified that they are there and come over and ice them.

Q. You are notified that they are there?

A. Yes, after they are there.

Q. I see.

A. But that is different than the regular train. When the regular train is coming in, why then we are notified ahead of time.

Q. You are always notified ahead of time?

A. Most always, unless something happens.

(Testimony of Robert C. Fincher.)

Q. Now when you were notified on the afternoon of the 17th [849] that a fruit train was going to be in the yard for icing, what did you do? I mean, what is your procedure down there on that dock?

A. Well, we start putting the ice out on the dock. It takes quite a little while to run that ice on the dock.

Q. All right.

A. The dock is long and it is quite a little ways to the dock from the plant, and we have to run our ice over there and get it out and have it ready there when the train comes in.

Q. What else do you have to do?

A. That is all, just get our ice out there and get it ready.

Q. What do you do, just put the ice in there without any salt?

A. We put the ice on the dock.

Q. What do you do——

A. Spot it, spot so many cakes off for a certain car. You figure how many cakes, what these cars are going to take.

Q. I see.

A. Spot so many cakes of ice there. Well, the salt is already sitting there, already there.

Q. You always have salt up there, do you?

A. We always aim to keep salt on the dock scattered all [850] along.

Q. Any time we go out there to that dock, there would always be salt there?

A. There is always salt there somewhere. Gen-

(Testimony of Robert C. Fincher.)

erally put it at each light, that is about the end of each refrigerator car.

Q. So this chain, of course, that conveys it goes the whole length of the icing dock, does it?

A. Yes, we have two chains there.

Q. That icing dock is about 1,300 feet long, isn't it?

A. I believe it is about 28 cars long, 28, 29.

Q. Beg pardon?

A. Just about 28, not quite 29.

Q. It is almost a quarter of a mile long, isn't it?

A. Yes, about 1,500 feet, just guessing at it.

Q. And the ice is taken all the way up to points where those cars may be spotted? A. Yes.

Q. That is, of the 28 or 29 cars, for the purpose of having everything in preparation for icing?

A. Yes, sir.

Q. Is that right?

A. Ice is got out there ahead of time, if we have time to get it there.

Q. Now on the afternoon, you had iced a car or iced a train, [851] isn't that correct?

A. Yes, sir.

Q. And after you finished icing the train, you still had enough salt left along that 1,300 foot dock so you didn't need any more for any trains that day?

A. No, sometimes we use it all. It is according to the cars. Sometimes cars will take six or eight, ten sacks of salt, so we never leave over five in a place, five or six.

(Testimony of Robert C. Fincher.)

Q. You had iced this train sometime between 4 and 6 o'clock or 4 and 6:30 in the afternoon of the 17th? A. Yes, sir.

Q. When were you notified of the arrival of another fruit train?

A. Well, I just can't remember that.

Q. When did you have another one in that day?

A. I don't remember whether we had one that day or not. We might have had a few cars.

Q. You had one at 9:35, as a matter of fact, that night, didn't you?

A. I believe we did, if I ain't mistaken.

Q. Well, now, do you know whether you ever received any instructions that an entire fruit train was going to be in there at 9:35 that day?

A. If there was one come that day, I received the [852] instructions, yes.

Q. Well, now, Mr. Fincher, do you know whether or not a fruit train was iced there at night at 9:35 that night?

A. If the records show it was, it was, yes.

Q. How long have you been sitting here in the courtroom? A. I came here yesterday.

Q. Well, you heard the official from the Northern Pacific testify from his records that a fruit train was in there at 9:35, didn't you?

Mr. Cashatt: Object to that, your Honor. That was not a fruit train. The records show it was one car and that they didn't ice it.

The Court: Well, I will sustain the objection.

Q. (By Mr. Etter): Was there a train or a car

(Testimony of Robert C. Fincher.)

or anything in there to be iced at 9:35? The records will indicate what it was.

A. I couldn't swear if there was.

Q. Beg your pardon?

A. I couldn't swear to that, no.

Q. Were you notified at all that there was going to be a car or a train in there at 9:35?

A. If there was one in there, I would have been notified, yes.

Q. Well, now, at 8:20 you were up there on the salt gig bringing salt up, isn't that right? [853]

A. Yes, sir.

Q. What for?

A. Just we were scattering salt along the dock. We have got to keep that salt, we don't when when there will be a train in there. There is no regular time for them freight trains to run as a rule, they may come in any time day or night.

Q. So you were up there getting salt on the north side of the dock?

A. We have to scatter that salt out. Whenever it runs shy, we aim to put it back, keep it there all the time in case.

Q. All right, as you were bringing the salt up on the salt gig, where were you taking it after you got it up on the dock?

A. We scattered it all along the dock.

Q. The whole 1,500 feet of the dock?

A. I believe we did at that time. Now we have a salt house on the other end that we don't——

(Testimony of Robert C. Fincher.)

The Court: Just what you did then, let's not go into what you do now. Go ahead.

Q. (By Mr. Etter): Were you placing the salt on the north and south sides?

A. We probably were, both sides.

Q. Both sides of the dock? [854]

A. But as a rule we use a whole lot more on the south side.

The Court: Just what you did then. Don't answer such long answers. Answer the questions directly and simply.

Q. (By Mr. Etter): Were you unloading the salt on both the north and south sides of the dock?

A. I suppose we were.

Q. You suppose you were. How many men did you have on shift that night in your crew, Mr. Fincher?

A. Well, that is hard to say just how many men.

Q. Well, Mr. Fincher, you are the foreman there, do you keep records? Does Addison Miller have any records of the people who worked that shift?

A. Yes, sir, they have them in the timebook.

Q. Beg your pardon?

A. They have the timebooks, but then maybe one day we have got 20 men, maybe the next day we have only got 10.

Q. All right, do you know how many you had on the 17th of July, 1952 on the shift from 3 to 11?

A. I couldn't swear to that just exactly, no.

(Testimony of Robert C. Fincher.)

Q. Well, did you examine your records to determine how many men you had working for you after you were subpoenaed to appear here as a witness for the defendant?

A. I never looked at the records to see how many men we [855] had.

Q. Did you check anything that happened on the 17th by any records you have prior to coming here to court?

A. No, sir, I don't have the timebook. I just keep the time for that day and the foreman puts the time down in the timebook.

Q. And you don't know how many you had working on that shift?

A. I couldn't swear to that, no.

Q. Could you approximate it for us?

A. Well, I would say there was 20.

Q. There were 20?

A. Yes, I would say maybe there were 20 or more.

Q. Did you check to find out any of the names of any of these men?

A. I check them when I come to work.

Q. I mean before you came here to testify?

A. No, sir.

Q. You said at the beginning of your testimony that when you came through the tunnel, that you stopped in the shed, as I understand it, right by the slush pit with about 15 men?

A. Yes, sir, something like that.

(Testimony of Robert C. Fincher.)

Q. Have you checked to determine who any of those 15 men were? [856]

A. I check the men when I go to work to see whether they are there or not, at 3 o'clock.

The Court: The question is whether you checked before you came down here. He says he didn't check.

Q. (By Mr. Etter): You checked——

The Court: He says he didn't check at all on anything.

Q. (By Mr. Etter): You didn't check the names?

A. No, sir.

Q. All right. All you remember is that Allan Maine and Gerry Stintzi were two of the men?

A. No, I can remember some of the other men that was there, too.

Q. All right, tell us who they were.

A. Well, there was one by the name of Johnson.

Q. Johnson, all right?

A. And Jerome, I believe.

Q. Jerome.

A. And I don't just remember how many of the regular men that works there the year around.

Q. And those men were all given their instructions on what to do in the section of the ice house where the slush pit is located as indicated in one of the exhibits? That is where you gave the instructions? A. I believe it was, yes. [857]

Q. All right. And as I understand you, you didn't go up on the dock?

A. Yes, I had to go—no, after I had given the

(Testimony of Robert C. Fincher.)

instructions, I had to go up on the dock to run the hoist.

Q. I thought you went out the door, after you gave the instructions, and down to the salt pit?

A. Well, yes, but then I had to come back and go up.

Q. You testified yesterday that you didn't turn the blue lights on for anything except icing cars?

A. And unloading salt.

Q. And unloading salt? A. Yes.

Q. So I take it if there is any salt unloading going on, you use the blue lights then, too, is that correct? A. That is, yes.

Q. Beg your pardon?

A. If it is at night, we use them, but we hardly ever unload at night.

Q. You know about the phone system between the Addison Miller dock and the yardmaster's office? A. Yes, sir.

Q. You know there is a loudspeaker system in the yards, do you not?

A. There is, but we never use that.

Q. You never use it? [858] A. No, sir.

Q. Have you ever used it in all the time you have been a foreman?

A. I have never used it since I have been there.

Q. I see. Has the Northern Pacific ever used it with reference to advising you or any of your men of the movement of cars?

A. That loudspeaker is put there for the railroad use.

(Testimony of Robert C. Fincher.)

Q. I am asking if you recall that the Northern Pacific has ever used it for the purpose of advising you or any of your men of the movement of cars?

A. No, I don't think so.

Q. Have they used it for any other purpose of advising you of anything?

A. No, they never use that to advise us.

Q. And, of course, neither the phone system nor the loudspeaker system was used on the 17th to advise you of anything? A. No.

Q. In your testimony the other day you indicated that in the 10 years you have been there, that you have dumped and your men have dumped empty salt sacks over on this dumping area north of Track 13?

A. Just since we have got the paper sacks.

Q. How long has that been? It was prior to 1952, wasn't [859] it? A. Yes.

Q. And how long has that been?

A. I couldn't just swear when we did start getting the paper sacks, but when we used burlap sacks, we saved those.

Q. You save those, but you have had paper sacks for several years? A. Yes.

Q. You take those over north of Track 13 and dump them in that dumping ground?

A. Yes, sir.

Q. How long have you dumped slush ice over there?

A. Ever since I have been there.

Q. Ever since you have been there?

(Testimony of Robert C. Fincher.)

A. Yes.

Q. Taken the slush ice over and dumped it in the same place, is that correct? A. Yes, sir.

Q. And that is what you instructed these two boys to do? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. All right. Tell me this, Mr. Fincher, when these men came to work, did you ever tell them anything about the [860] blue lights that were up on the dock?

A. I don't know as I did, no.

Q. Did you ever instruct them as to the purpose of those blue lights, if they had a purpose?

A. Yes, I think they knowed what them blue lights were there for.

Q. I didn't ask you if they knew, I asked if you instructed them and told them about it?

A. I don't know that I did, but at night I always turned them on.

Q. Beg your pardon?

A. When we ice cars at night, I always turned the blue lights on.

Q. I see. And when you were unloading salt?

A. Yes.

Q. I see. Did you ever advise Gerry Stintzi or Allan Maine or Joe Vallarano, or these people that have testified here, about those blue lights?

A. No, I don't think so.

Q. Beg your pardon? A. No.

Q. Now, Mr. Fincher, do you recognize this man who is seated right here behind me?

(Testimony of Robert C. Fincher.)

A. No, sir.

Q. Have you ever seen him before? [861]

A. Not that I know of. I might have.

Q. Well, don't you recall that prior to the forepart of August of 1952, that you talked to a man by the name of Day?

A. Oh, yes, now I remember. He just come out and said a few words to me.

Q. Do you remember having a conversation with him? A. Yes.

Q. Now referring, Mr. Fincher, if I may, to a time right after the 1st of August, probably between the 1st and 7th of August, do you recall having a conversation with Mr. Day out at the Addison Miller dock?

A. Yes, sir, I do now since you mentioned it.

Q. You believe you do?

Mr. McKevitt: That is 1952?

Mr. Etter: 1952.

A. Yes.

Q. Do you remember whether anybody was present except you and Mr. Day?

A. Well, we didn't—he didn't only just ask me just one question, I believe.

Q. Well, I will ask you if Mr. Day asked you, in substance and effect, whether or not the blue lights were on on your dock just prior to the time of the accident which occurred to Gerry Stintzi? Did he ask you that [862] question?

A. That is what he asked me, and I told him no.

(Testimony of Robert C. Fincher.)

Q. And your answer at that time was no, isn't that correct? A. Yes, sir, that's right.

Q. Do you remember that?

A. Yes, I remember it now.

Q. And do you remember then that he asked you the question why hadn't you put up the blue lights?

A. He said he wouldn't ask me any more questions.

Q. No, just answer that, did he ask you that, in substance and effect, why was it you didn't have the blue lights up? A. I don't think so.

Q. You don't think so? Would you say no?

A. No, he didn't.

Q. All right. I will ask you whether or not at that time when you were talking with Mr. Day, referring to the fore part of August as I have indicated in my previous questions, he didn't say to you, or you didn't answer him when he asked you the question why you didn't have the blue lights up, if you didn't answer him, in substance and effect, as follows: "Well, first, we weren't expecting any switch, and, second, I don't think the blue lights are of good enough quality to be seen, anyway." I will ask you if you made that statement to Mr. [863] Day?

A. I don't believe I did.

Q. Well, now, will you say that you didn't?

A. Yes, I think I will say I didn't.

Q. You will say that you didn't.

The Court: I think the record here should show it is 10 o'clock and there has been set for hearing

(Testimony of Robert C. Fincher.)

at this time a matter in connection with the bankruptcy proceeding of S. P. Beecher. It is an order to show cause why personal property should not be removed from the premises at Peshastin in the matter of S. P. Beecher, and I will not take it up at this time. I will take up that matter at 11 when it is time to recess, and anyone here in connection with that, attorneys or anyone else, will be excused until 11 o'clock.

All right, go ahead.

Q. (By Mr. Etter): You have stated you didn't give those answers to Mr. Day, is that correct?

A. I ain't positive now.

Q. Beg your pardon?

A. I am not positive what happened, what Mr. Day said.

Q. You are not positive. May I assume that you could have possibly given that information in the form of those answers to Mr. Day?

A. I might have said something, but—— [864]

Q. You might have? A. But he——

Q. But if you mentioned the fact that the blue lights weren't of good enough quality to be seen, anyway, you might have mentioned that, will you tell us why?

A. I don't believe that I did say they wasn't. I might have said you couldn't see them blue lights very far during the daytime.

Q. Didn't you say, as a matter of fact, you couldn't see them, anyway, even if you had them on? Isn't that what you said?

(Testimony of Robert C. Fincher.)

A. No, I don't think so.

Q. Well, what was it you said about the blue lights, now you tell us?

A. I don't know just exactly what I said about them. He asked me if the blue lights were on and I told him no.

Q. Then what else did he say now, if you remember anything else?

A. He said that he wouldn't ask me for any statement because he didn't want me to swear to something that I would have to——

Q. As a matter of fact, didn't Mr. Day ask you if you would give him a statement to that effect? Isn't that what happened?

A. I don't believe he asked me if I would give him a [865] statement.

Q. And, as a matter of fact, in answer to that, didn't you say that no, you couldn't give him a statement because you had been told not to, and that if you did, it would mean your job; isn't that what you told Mr. Day?

A. No, sir, no, sir.

Q. All right, what did you tell him?

A. I didn't tell him that at all.

Q. What did you tell him, then?

A. I never told anybody it would be my job if I told him.

Q. Well, Mr. Fincher, what was it you told him?

A. I told him the blue lights were not on.

Q. They were what?

A. The blue lights were not on when——

(Testimony of Robert C. Fincher.)

Q. Were not on?

A. Were not on, when he asked me if the blue lights were on, and I told him no.

Q. And what else did you have to say about the blue lights?

A. I don't remember whether there was anything more said about them or not.

Q. Well, I am merely trying, if I can, to refresh your recollection as to this conversation. I have inquired and I don't want to repeat myself. Am I to assume that you don't remember, is that it? [866] A. That is it, yes, sir.

Q. And you are not sure of what happened or what was said? A. Yes, sir.

Q. Is that correct?

A. That probably is.

Mr. Etter: That is all, sir.

Redirect Examination

Q. (By Mr. Cashatt): Mr. Fincher, this chain that you mentioned that brings the ice up, does that run the full length of the dock?

A. No, we have two chains. One runs to the center house and then we have another chain from there on.

Q. When those chains are running, do they make any noise?

A. Oh, yes, they make quite a lot of noise.

Q. And you say the dock is about 1,300 feet long?

A. I judge it is between 13 and 1,500 feet.

(Testimony of Robert C. Fincher.)

Q. Now where do you turn on the lights, the white lights, for that dock?

A. You turn the lights on 12 on this end and you go to the center house for the rest of the lights. That is the center of the dock.

Q. You turn the lights——

A. For the south side.

Q. For Track 12? [867]

A. On this end.

Q. On the west end?

A. That turns them on to the center house, but you have to go to the center house to turn the rest of the lights on from there to the other end of the dock.

Q. When the white lights are on the dock at night, Mr. Fincher, what work is usually being carried out there?

A. Well, lots of times we are putting up salt, that is about all, unless we are icing cars, and we would have the blue lights on, too, if it is dark.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. Etter): Well, Mr. Fincher, regardless of the position of your lights that night, you weren't expecting a switch of cars into there when they came in at 8:30, were you?

A. Yes, they may push cars in there any time if we ain't got the blue lights on.

Q. Didn't you tell Mr. Day that you weren't expecting a switch at that time? A. No, sir.

(Testimony of Robert C. Fincher.)

Q. You didn't say anything like that to him?

A. No, sir.

Q. You are sure of that? [868]

A. I am sure of that.

Mr. Etter: That is all.

Mr. Cashatt: That is all.

The Court: All right, call the next witness.

(Witness excused.)

Mr. Cashatt: Mr. McCartney, please.

R. J. McCARTNEY

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): State your name, please.

A. R. J. McCartney.

Q. And you live in Spokane, do you?

A. Just out of the City of Spokane.

Q. How long have you lived in this area?

A. About 46 years.

Q. And what is your occupation?

A. Ice foreman.

Q. For what company?

A. Northern Pacific Railroad Company.

Q. And how long have you been ice foreman for Northern Pacific Railway?

A. About 20 years. [869]

Q. And what shift do you work?

A. Daytimes, 8 until 4.

(Testimony of R. J. McCartney.)

Q. Mr. McCartney, handing you Exhibit No. 39, do you recognize that exhibit?

A. That is a record that I keep of salt unloaded into the salt houses.

Q. And the handwriting on that exhibit, is that your handwriting? A. All mine.

Q. And the first sheet, Mr. McCartney, I notice on the left-hand side it begins with January and winds up with December and has dates set forth after those months. Tell us what that column on the left hand indicates.

A. That is the dates that I have asked for carloads of salt to use in icing at Yardley. That is my request for salt for the year of 1952, and the dates are the dates they were supposed to come on or approximately.

Q. Keep your voice up, please.

A. Approximately the date that they are supposed to come.

Q. And I notice, Mr. McCartney, opposite the date of July 15th there are other notations. The one I refer to particularly is G.N. 20206. Do you see that location? A. Yes, sir.

Q. Now did you write that number there?

A. Yes, sir. [870]

Q. And what is that?

A. That is a carload of salt that arrived.

Q. Louder, nobody can hear you.

A. That is a carload of salt that arrived on July the 16th and was unloaded on July the 16th into the salt house.

(Testimony of R. J. McCartney.)

Q. And when on July 16th? Did you put that designation on Exhibit No. 38? Excuse me, 39?

A. This car number was written in the day that the salt arrived, and the date I show there, arriving date, and then when they unloaded at the salt house, I put the date unloaded so I can keep track of how many cars I have on hand and when they are unloaded.

Q. Now I see that it shows arrived 7-16 and unloaded on 7-16, is that right? A. Yes, sir.

Q. Now following that, the next designation is P. & E. 3835. Does that indicate a carload of salt?

A. That was a carload of salt that arrived on July the 18th and we unloaded it on July the 18th.

Q. And it shows the arrival date, July 18th, and the unloaded date, July 18th?

A. Yes, sir.

Q. From that record, is there any car of salt that arrived on July 17, 1952 and was unloaded on July 17, 1952? [871]

A. No, we didn't have a carload of salt in the yard on July the 17th, 1952 to unload.

Q. And for what reason and what purpose do you keep the record, Exhibit No. 39?

A. We keep the record so that I know how much salt I have on hand, and I keep the arrival date and the unloading date so that we can keep track of—not keep them too long and have too per per diem.

Q. Well, now, the last answer you gave, I see the first car on July 16th, the car on July 16th is G.N.

(Testimony of R. J. McCartney.)

Does that mean it was a Great Northern Railway car?

A. That means it was Great Northern, belonged to the Great Northern Railway.

Q. And the next one I see is P. & E. Does that indicate another railroad line?

A. That belongs to the P. & E.

Q. A little louder, please.

A. That belongs to the P. & E. Railroad, that car does.

Q. And while the Northern Pacific Railway has those cars at its yard in Yardley, do they have to pay anything to the other line, the Great Northern or the P. & E., for the car? A. They do.

Q. And is that the reason you keep the date of arrival and the date unloaded? [872]

A. Yes.

Mr. Cashatt: You may inquire.

Cross Examination

Q. (By Mr. MacGillivray): Mr. McCartney, during the summer months at Yardley yards, you always have on hand and available a car or cars of salt, do you not? A. Sometimes.

Q. Well, don't you always during the busy summer months?

A. Well, at that time we didn't have. We were using it as fast——

Mr. McKevitt: Louder, please, we can't hear you.

(Testimony of R. J. McCartney.)

A. We ordinarily do have, but at that time I'm quite sure we didn't have.

Q. (By Mr. MacGillivray): Are you positive of that? A. I'm quite sure.

Q. Are you positive of it?

A. No, not absolutely positive.

Q. The usual custom during the busy summer months is to have a car or cars of salt available in those Yardley yards, is it not?

A. Well, no, it isn't.

Q. During the busy summer months?

A. We try to, but we don't make it sometimes.

Q. Well, isn't that ordinarily the situation during those summer months?

A. Yes, it is, ordinarily.

Q. Yes. And those cars of salt or that car of salt is available in the yard, might be spotted any place in the yard in the vicinity of the salt house?

A. I don't understand?

Q. Well, you spot a car or cars of salt during the summer months maybe on Track 1 or 2, or 8 or 14? A. Store it.

Q. Different places?

A. Yes, might store it.

Q. And you try to spot them in the near vicinity of the icing dock?

A. Have to spot them exactly so you can put a board from the car to the window to unload them.

Q. I mean before they are actually being unloaded, you have them available in the yards, you spot them on some track nearby the icing dock?

(Testimony of R. J. McCartney.)

A. Not necessarily, they can be anywhere.

Q. Not necessarily, I see. And it is a fact, is it not, that sometimes you will unload a car of salt in one day and sometimes it might take two days or even three days? A. Oh, no. [874]

Q. In and out? A. Oh, no.

Q. Do you mean you always unload a car of salt at one sitting or one spotting?

A. We have had very rare occasions when we have unloaded a car of salt in two spottings. Ordinarily, it is done in one spotting.

Q. Well, it does happen?

A. It has happened once in a great while.

Q. Yes. You don't know, do you, with any degree of certainty how many cars of salt were available spotted some place in the Yardley yards on July 17, 1952?

A. There were none. That record, you can look at that record, and you will find that there were none. That record is complete.

Q. You mean that this record indicates positively that there was no car of salt in there on July 17, 1952? A. Yes, sir.

Q. Well, did you not know that several fruit trains were due in and came in to the Yardley yards on July 17, 1952?

A. Well, there would be maybe two, I wouldn't know.

Q. Well, do you know that there were at least two? A. I don't know.

Q. And when we speak of a fruit train, that is

(Testimony of R. J. McCartney.)

a train [875] composed solely of refrigerator cars, is it not? A. No.

Q. Oh, it isn't?

A. No, it can have double, single, everything else on it. All a fruit train has to have is 10 cars of fruit.

Q. Well, you know that there was a fruit train in there at 4 o'clock on July 17th composed of some 56 reefer cars?

A. There may have been, I wouldn't know.

Q. Well, do you know that on that same date, later in the evening, another fruit train came in to the Yardley yards? A. It could be.

Q. Well, do you know that?

A. No, I don't, I didn't look up any records.

Q. Well, then, assuming, Mr. McCartney, that a fruit train was iced between 4 o'clock and 6:10 on July 17th, and after the icing of that fruit train a supply of salt was then needed at the icing dock, a salt car would be shot in?

Mr. Cashatt: I object to that, your Honor. It is assuming facts that aren't in evidence at all. There is no showing that there wasn't salt in the salt houses.

The Court: Well, he may answer the question.

A. No, no, we had no salt that day to put in.

Q. (By Mr. MacGillivray): I see. [876] According to the record.

Mr. MacGillivray: That is all.

Mr. Cashatt: That is all, Mr. McCartney.

(Witness excused.)

Is Mr. Maine here? I would like to call Mr. Maine.

ALLAN MAINE

having previously been sworn, resumed the stand on behalf of the defendant and testified further as follows:

Direct Examination

Q. (By Mr. Cashatt): Mr. Maine, what kind of cars were the two cars under which or between which you were passing the bucket under the couplings?

A. Have no idea what the cars were.

The Court: If you will try to speak up a little louder.

A. Have no idea of what kind of cars they were.

The Court: All right, go ahead.

Q. (By Mr. Cashatt): Well, now, you say that you were going between those cars at a point about 10 feet west of the door that you were coming out of, is that right? A. Approximately that.

Q. The car to the east of where you were going through [877] there, what kind of a car was that?

A. I wouldn't remember, I don't know what kind of car it was.

Q. Was the car immediately to the east, was that a boxcar?

Mr. MacGillivray: Objected to, repetitious. The boy has said twice he didn't know, has no idea of what either one of the cars was.

The Court: He may answer, if he can.

A. I wouldn't know.

The Court: You don't remember what it was?

(Testimony of Allan Maine.)

A. No.

Q. (By Mr. Cashatt): Well, Mr. Maine, was the car that was immediately to the east where you were going between the two cars, was the car that you say they were unloading salt out of?

A. Directly to the east?

Q. Yes, sir? A. No.

Q. How many cars to the east was it that they were unloading salt? A. I wouldn't know.

Q. But it wasn't the car immediately to the east of where you were going between the couplings?

A. No.

Mr. Cashatt: That is all. [878]

The Court: Any cross examination?

Mr. MacGillivray: No, that is all.

The Court: That is all, then.

(Witness excused.)

Mr. Cashatt: Your Honor, I would like to call Mr. Stintzi as an adverse party, and I have just a couple of questions, if it will be all right, I will ask them right here.

The Court: Well, I think he may come up here. It would be easier for the reporter.

GERALD STINTZI

called as an adverse witness by the defendant, having previously been sworn, testified further as follows:

Direct Examination

Q. (By Mr. Cashatt): Mr. Stintzi, what kind of cars were the two that you were going between?

(Testimony of Gerald Stintzi.)

A. I did not notice.

Q. Was the car immediately to the east of the one or the two that you were going in between, was that the car from which you say they were unloading salt? A. No.

Q. How many cars to the east was it where they were unloading salt? [879]

A. I would have to approximate.

Q. Can you do that? A. Yes.

Q. How many?

A. Between two and three cars.

Mr. Cashatt: That is all.

The Court: Any questions?

Mr. MacGillivray: No, your Honor.

Mr. Etter: No questions.

(Witness excused.)

Mr. Cashatt: Will you stipulate, counsel, on this exhibit?

The Clerk: Defendant's 43 for identification.

Mr. Cashatt: May it be stipulated, Mr. MacGillivray and Mr. Etter, that Defendant's Exhibit No. 43 may be admitted in evidence?

Mr. Etter: So stipulated.

Mr. MacGillivray: Yes, sir.

Mr. Cashatt: Which is a map drawn at a scale of one inch equals five feet, showing a portion of the icing dock, the salt house, the tunnel shed, Track 13 and Track 12.

Mr. Etter: Mr. Cashatt. it is agreed, too, isn't it—I should have mentioned this before—that the

icing platform or the dock as it is shown in this exhibit—which is what number? [880]

The Clerk: 43.

Mr. Etter: ——43, and the exhibit back here——

The Clerk: That is No. 1.

Mr. Etter: ——which is No. 1, that that dock is not in any sense truly representative of the length of that dock?

Mr. Cashatt: That is correct, Mr. Etter, it is a portion of it.

The Court: This No. 43 will be admitted, then. This shows, really, a portion of No. 1 in larger scale?

Mr. Cashatt: That is correct, your Honor, a portion of No. 1 in a larger scale.

(Whereupon, the said map was admitted in evidence as Defendant's Exhibit No. 43.)

Mr. Cashatt: Mr. Crump, please. [881]

JAMES CRUMP

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. Cashatt): Your name, please?

A James Crump.

Q. Where do you reside?

A. 9525 East Mission in Opportunity.

Q. How long have you lived in the Spokane area? A. 39 years.

Q. Married? A. Yes.

Q. Family? A. Yes.

(Testimony of James Crump.)

Q. What is your occupation?

A. Railway yardmaster.

Q. And for what railway?

A. Northern Pacific.

Q. How long have you worked for Northern Pacific? A. August 25, 1937.

Q. And since 1937, what jobs have you handled for the company?

A. From 1937 to 1943, I acted as switchman; sometime in 1943 to the present time, I have been used as a [882] yardmaster.

Q. And during your period of service with the Northern Pacific, how much of that time has been spent at Yardley, Washington?

A. Oh, nine-tenths of it.

Q. And since 1943, you have been a yardmaster or assistant yardmaster, have you?

A. That's right.

Q. And, Mr. Crump, you are familiar, are you, with the Northern Pacific yards at Parkwater?

A. Yes.

Q. Can you tell us, Mr. Crump, if that is what is known as a saucer yard?

A. That's right.

Q. And explain, will you please, what a saucer yard is?

A. A saucer yard is shaped just like the word implies, it is shaped like a saucer. The purpose of that is to allow cars, when they are cut off from the engine, to roll down towards the center of the track. In other words, the center of the yard is the lowest

(Testimony of James Crump.)

portion of this yard. That way it speeds up switching operations. Each and every separate track doesn't have to be shoved with the power of the engine; all we have to do is cut the cars off and gravity takes care of the movement of the cars.

Q. And where is the approximate center of the yard, can you tell us, in relation to anything we have talked about here, the ice dock or tunnel or anything like that?

A. Well, just offhand I would say the center would be about where that tunnel is that someone spoke of from Addison Miller's plant to the ice dock. That is about the center of the yard.

Q. Well, now, going east from Switch 13, is there any down grade on Track 13? A. No.

Q. Can you tell us anything further about Track 13 between Switch 13 and say the Addison Miller dock?

A. Well, it is not descending like the rest of our track. In other words, our yard there tends to be more level. I would say that that track is almost level. If anything, it is descending to the west instead of the east.

Q. Now in your switching operations out there, Mr. Crump, what can you tell us about the custom or the procedure of making up trains, locating different cars, and so on, in relation to when they are uncoupled from an engine and let drift down the track?

A. Well, it is the general practice since I have worked there to speed up the engine in order to

(Testimony of James Crump.)

give the cars [884] enough momentum to carry themselves to the approximate destination where the foreman plans them, and the cars are disengaged from this engine after the speed is gathered up, and they, being free-wheeling, roll down to this track that they are designated for. If we shoved all these cars, why you can easily see that it would be a great amount of time consumed in that movement. This way it speeds up the operations.

Q. And for the practical operation of the yards, is it necessary to switch in that manner?

A. You mean by cutting the cars off?

Q. Yes, sir? A. Yes.

Q. Mr. Crump, prior to July 17, 1952, had you been acting as an assistant yardmaster on any particular shift at Yardley, oh, say, for six months before that date? A. Oh, yes.

Q. And on what shift?

A. Second shift.

Q. And what is the second shift?

A. Well, the hours are normally from 3 to 11 o'clock.

Q. And in your job as yardmaster, assistant yardmaster, were you familiar with the custom and the use of the blue light by Addison Miller on Tracks 12 and 13? A. Yes. [885]

Q. Will you tell us what your understanding of that custom was?

A. Well, we have always been on the alert to watch for the blue light on Tracks 12 or 13, and that blue light signifies that there are men working

(Testimony of James Crump.)

on or about cars, and whenever we saw that blue light turned on, we saw to it that there was no engines allowed on that track where they would couple onto the cars where these men might be working.

Q. Whose duty was it to turn the lights on?

A. Well——

Q. The blue lights?

A. The blue lights? That would be someone from the ice dock, that is up to Addison Miller to do that.

Q. And was there any understanding as to how long before they started any work on or about cars they would turn those lights on, blue lights?

A. Well, I don't know of any definite understanding. It was just kind of an unwritten rule that they would give us about five minutes notice. They always seemed to turn them on ahead of the time that they put their men out on top of the cars or whatever they were doing, give us time to get our engines off of there and what not.

Q. And tell us, Mr. Crump, about the loudspeaker system in [886] the yards.

A. Well, the loudspeaker system is for use of the yardmaster to contact the switch foreman or employees on both ends of the yard. Toward the center of the yard, we have one that is used to inform the employees as they go down toward the middle of a train of any change that might have taken place in their original instructions. That saves us going back and doing our work over again.

(Testimony of James Crump.)

We try to contact our employees by the use of the speaker system to make it understood that there is changes to be made, and that saves us time.

Q. During your experience in your work at the Yardley location, have you ever used the loudspeaker system to warn Addison Miller employees or anyone around the Addison Miller dock of any movement of cars in the yard? A. No.

Q. Are you familiar with the microphones—I don't mean microphones, I mean the speakers—that are located on a post between Switch 13 and the Addison Miller dock? Are you familiar with those?

A. Yes, I have used them.

Q. In what direction are those speakers set?

A. Well, they are placed—there is two horns at the top of this pole and one is facing north, one facing south, [887] so as to broadcast over the top of the yard where our switch foremen and our switchmen can pick our voices.

Q. Mr. Crump, prior to July 17, 1952, were you familiar with the phone arrangement between the yard office and the Addison Miller dock?

A. Yes.

Q. Was it customary for Addison Miller to use that phone and call you when they intended to have men working on or about the dock?

A. Yes, they either notified the yardmaster on duty or the ice foreman before they did anything down there.

Q. And in the yard office, Mr. Crump, does the ice foreman work under your jurisdiction?

(Testimony of James Crump.)

A. That's right.

Q. And you have access to his information and his work as it is carried on? A. Oh, yes.

Q. Does he keep in close touch with you throughout the shift as to anything occurring at the Addison Miller dock? A. Yes.

Q. Now I believe, Mr. Crump, you said that about nine-tenths of your entire service with the Northern Pacific has been spent at Yardley?

A. That's right. [888]

Q. In that period of time, Mr. Crump, did you have an opportunity of being close to or around the Addison Miller dock? A. Many times.

Q. Did you ever see anyone or any employee of the Addison Miller Company crawling under couplers of any stationary cars located on Track 13?

A. No.

Q. Did you ever see any Addison Miller employees carrying slush ice in buckets across Track 13? A. No.

Q. Prior to and up to and including July 17, 1952, what did you know about any slush ice operation at the Addison Miller dock?

A. Well, I had seen the slush ice in my trips to the ice dock. I had always assumed that the melting process——

Mr. MacGillivray: Just a minute, I object to what he might have assumed.

The Court: Yes, I think you should state it without your assumptions or conclusions.

Q. (By Mr. Cashatt): Well, when you saw the

(Testimony of James Crump.)

slush ice there, Mr. Crump, did you see it melting in the location where it was? A. Yes.

Q. Did you prior to July 17, 1952, know that they had ever [889] carried any slush ice outside of the building? A. No, I didn't.

Q. Did it ever come to your attention, through your own personal observations or through your employees under you, that Addison Miller employees ever crossed Track No. 13 for any purpose?

A. No.

Q. Now, Mr. Crump, at times when you have been in the yards at night, have you observed the white lights? A. Yes.

Q. Being illuminated on the Addison Miller dock? A. Yes.

Q. Just tell us in your own words what that indicated to you, if anything?

A. Well, that there was men waiting for cars to be spotted, or they were preparing their work ahead by hauling salt and ice, that is, placing it on the dock in preparation for the cars to be spotted.

Q. Now on July 17, 1952, what time did you come to work, Mr. Crump? A. 3 p.m.

Q. And when you arrived at the yard office at 3 p.m., did you look—or were you given Plaintiff's Exhibit No. 40? A. Yes. [890]

Q. And what is Plaintiff's Exhibit No. 40?

A. Well, that is a page from what is known as our turnover book. It gives the yardmaster coming on duty a picture on paper of what the yard looks

(Testimony of James Crump.)

like as to makeup of trains, storage of cars, clear tracks, and so on.

Q. And was that left for you by the assistant yardmaster who was just going off shift?

A. Yes.

Q. And was that Mr. Miller? A. Yes.

Q. Mr. Crump, referring to Track 13, is there a notation on Exhibit 40 concerning Track 13?

A. It says "Icers for 661 & City."

Q. Then after you got on shift, what did you do, if anything, about the cars that were on Track 13, the icers for 661 and city?

A. Well, shortly after the switching crews went to work, I directed one of the crews to remove these cars from Track 13 and place them on the respective tracks.

Q. Showing you Defendant's Exhibit No. 38, do you recognize what that is, Mr. Crump?

A. Yes, this is the form that is kept up to date by the ice foreman.

Q. Are the icers for 661 and the city shown on Exhibit No. 38? [891]

A. On this one here?

Q. Yes? A. Well, they probably are.

Q. This is starting at 3:45, I think, is the first time notation.

A. Oh, yes, there is one here, "Stop Lewiston."

Q. Two cars shown there, Mr. Crump?

A. I see only the one, Lewiston.

Q. Lewiston? A. Uh-huh.

(Testimony of James Crump.)

Q. Then did you give the orders to take those cars off of Track 13? A. Yes.

Q. And at the time you removed those cars, did you give orders to put any salt car or any other car on the track before the fruit train arrived?

A. No.

Q. And did a fruit train arrive that afternoon?

A. Yes.

Q. And is that Train No. 5112?

A. That's right.

Q. About what time did that train arrive?

A. Oh, about 4 o'clock.

Q. And when it arrived in the yard, did you have anything to do with the locating of that train on any tracks? [892]

A. Yes, I direct the train crews coming in where to place their train.

Q. And did you direct the train crew on Engine 5112 where to place that train?

A. Yes, on No. 12.

Q. And after they placed it on No. 12, did you have the train divided or did you do anything like that with it?

A. Yes, I directed the east end switch crew to take off what cars were east of the ice dock on No. 12 and place them on Track 13 so they could ice on both sides of the dock.

Q. The evidence here is that there were 55 cars in that train. Is that about to your recollection?

A. That is about right, yes.

(Testimony of James Crump.)

Q. Then about what time, Mr. Crump, was that icing operation on that fruit train completed?

A. Oh, around 6 o'clock, I guess.

Q. How did you know or how were you advised that the operation was complete?

A. By the man in charge from Addison Miller notified the ice foreman and he, in turn, notified me that they are completed with their work.

Q. And were you so notified on the evening of July 17, 1952, shortly after 6 o'clock?

A. Yes. [893]

Q. And after receiving that notification, what orders did you give, if any, concerning the movement of that fruit train?

A. I directed the switch crew on the east end of the yard to pick up the cars off of No. 13, which they had placed there, put them back on the train so that we could complete the makeup of the train.

Q. And did the switch crew carry out those orders? A. They did.

Q. What time did the train leave the yards?

A. Oh, it was around 7 o'clock.

Q. Now at that time, when you ordered the switch crew to take the cars off of Track 13, when that operation was completed, was the Track 13 clear? A. Yes.

Q. Of all cars?

A. Of all cars, yes.

Q. Following that, Mr. Crump, what were the next orders you gave for the placement of any cars of any kind on Track 13?

(Testimony of James Crump.)

A. Well, sometime after the departure of the fruit train, Foreman Sheppard came down to the yard office with some cattle cars and wanted to know where to place them, so I instructed him—I went outside and told him to put them on Track 13, which is normally our East storage [894] track.

Q. Where had those cars come from, do you know?

A. Well, they had accumulated at Armours. I assume they were Armours' or stock tracks, anyway.

Q. That man you mentioned, Sheppard, is he on that run of Armours?

A. Yes, that is his job.

Q. Carstens. And you say you instructed him to place those on Track 13? A. Yes.

Q. And were you outside of the yard office when you gave that instruction? A. I was.

Q. Did you see the cattle cars, the stock cars, as Switchman Sheppard was placing them on Track 13? A. Yes.

Q. How many cattle cars were there in that group? A. Nine, I believe.

Q. And what procedure was used in putting those cars on Track 13?

A. After I gave him his instructions, he climbed aboard the end car, in other words, the east car, and they started shoving down our working lead toward No. 13 Switch. He stopped the movement, got off, threw the switch, and then as the engine backed

(Testimony of James Crump.)

up, the cars were [895] uncoupled from the engine and they drifted slowly into Track 13, which was clear.

Q. Were there any cars on Track 13 at the time these 9 empty stock cars were switched onto the track? A. No.

Q. When you were outside the yard office, did you look down Track 13? A. Yes.

Q. What did you see?

A. Well, it was clear prior to that time.

Q. And then were the 9 stock cars placed on Track 13? A. Yes.

Q. Now what were you using Track 13 for on that particular night right at the time that you gave the orders to put the 9 stock cars on the track?

A. Normally, that track is used for an accumulation of eastbound freight business, and so we use that where we store our eastbound cars.

Q. And were you putting these 9 empty stock cars onto the track to make up a train which would later go East?

A. Yes, they were destined to go East, uh-huh.

Q. And do you know what kind of stock cars those were?

A. They were foreign, I believe they were C. B. & Q.

Q. And empty? A. Oh, yes. [896]

Q. Was there anything, merchandise of any type or kind, in those stock cars as they passed by you and went onto Track 13? A. No.

(Testimony of James Crump.)

Q. About what time, as nearly as you can say, were these 9 stock cars placed on Track 13?

A. Oh, I suppose it was around 7 o'clock.

Q. After the fruit train had pulled out, is that right? A. Yes.

Q. And do you recall giving Foreman Prophet an order for the picking up of 14 cars on Track 43 with instructions to place them also on Track 13?

A. Yes.

Q. At the time you gave that instruction, Mr. Crump, had any other cars of any kind been placed on Track 13 after these 9 stock cars you mentioned went down there? A. No.

Q. At the time you gave Mr. Prophet the instruction that you have just mentioned, did you know of your own personal knowledge all of the cars that were on Track 13?

A. Yes. I have to.

Q. And that is part of your job, is that right?

A. That's right.

Q. Now did you see the switching operation, did you personally observe the switching operation that Prophet [897] carried out to put the 14 cars on Track 13? A. Yes.

Q. Where were you located at that time?

A. Well, just outside of the yard office.

Q. At that time, Mr. Crump, tell us what the condition of lightness or darkness was.

A. Well, it was still light, the boys weren't using their lanterns yet, so I could see down Track 13, it was clear.

(Testimony of James Crump.)

Q. You could see down Track 13, could you, sir?

A. Yes.

Q. And did you stay at that location and keep your eye on the switching movement as it was being made? A. I did, yes.

Q. Did you also keep a lookout down Track 13 at the Addison Miller dock? A. Yes.

Q. Did you see any blue light on Track 13 at any time when this switching operation was being carried out? A. No.

Q. I think, Mr. Crump, I should have said did you see any blue light on the Addison Miller dock on Track 13 at any time that switching operation was being carried out? A. No. [898]

Q. And how long did you follow those cars?

A. Well, until they were well into No. 13. They were rolling so slowly I was dubious whether I should let these boys go to lunch or not for fear the cars wouldn't roll in far enough to clear our working lead. So I stood there and watched them roll down there very slowly until they were in the clear of our working lead on Track 13.

Q. And at that time, would they be well down Track 13 toward the Addison Miller dock, when you last saw them? A. Yes.

Q. Now at any time, Mr. Crump, between the time you came on shift at 3 o'clock in the afternoon of July 17, 1952, and the time you went off shift at 11 o'clock on that day, was any salt car ever placed on Track 13? A. No.

Q. If any salt car had been placed on Track 13,

(Testimony of James Crump.)

under whose direction would it have to have been done? A. Only under my direction.

Q. Could anybody else in the yards have placed a salt car on Track 13 without your direction or without your order? A. No.

Q. Or without your knowledge?

A. No, not without my knowledge. [899]

Q. When you are acting as the assistant yardmaster on a shift out there, do you have full and complete charge of all switching crews that are working in the yard? A. That's right.

Q. Are they all directly under your supervision? A. Directly under.

The Court: It will take some time to conclude with this witness?

Mr. Cashatt: I presume it will, your Honor.

The Court: Recess?

Mr. Cashatt: That will be fine.

The Court: We will recess for 10 minutes.

(Whereupon, a short recess was taken.)

The Court: Mr. Crump, you may take the stand again.

The Clerk: Your Honor, I have marked Defendant's 44, 45 and 46 for identification.

The Court: All right.

Q. (By Mr. Cashatt): Mr. Crump, handing you Defendant's Exhibit No. 44 for identification, will you look at that photograph and state whether or not you recognize what is shown there?

A. Yes, I do.

Q. And what you see in the photograph, would

(Testimony of James Crump.)

the conditions you see there, as far as the track and switch, [900] and so on, be the same as it was in July, 1952? A. Yes.

Q. Handing you Defendant's Exhibit No. 45 for identification, do you recognize what is shown there? A. Yes.

Q. And is that a true representation of the way that section of the yard looked in July, 1952?

A. Yes.

Q. Handing you Defendant's Exhibit No. 46 for identification, will you state if you recognize what is shown there? A. Yes, I do.

Q. And the conditions shown there in Exhibit 46 for identification, are they the same as they were in 1952? A. Yes.

Q. July of '52.

Mr. Cashatt: Offering Defendant's Exhibits 44, 45 and 46.

Mr. MacGillivray: May I inquire, Mr. Cashatt, are these all of the pictures?

The Court: Let's see, what are those numbers?

Mr. Cashatt: 44, 45 and 46, your Honor.

Mr. MacGillivray: May I inquire if these are all of the pictures taken on behalf of the defendant on whatever date these were taken? [901]

Mr. Cashatt: 45 and 46, Mr. MacGillivray, are all that were taken on that particular day. 46 is the only black and white picture. The others I showed you were colored film that required a viewing box to see.

Mr. MacGillivray: Was there not, Mr. Cashatt,

(Testimony of James Crump.)

a picture or pictures taken of two railroad cars showing the coupling between them?

Mr. Cashatt: Those, Mr. MacGillivray, were taken on an earlier date.

Mr. MacGillivray: Do you have them?

Mr. Cashatt: I don't have them, I will be glad to furnish them.

Mr. MacGillivray: Will you furnish them when we return after lunch?

Mr. Cashatt: I will.

Mr. MacGillivray: I have no objection to 44, no objection to 45. I might inquire as to 46.

The Court: All right.

Voir Dire Examination

Q. (By Mr. MacGillivray): Exhibit No. 46 was taken at what time of night?

A. I really couldn't say when it was taken.

Q. Well, don't you know that that picture was taken at 8:20 p.m. on July 17, 1953?

A. No, I don't. [902]

Q. In that picture is shown the icing dock?

A. No.

Q. Is not shown in the picture?

A. There is a silhouette of it, yes.

Q. And are there any lights shown on the icing dock in that picture? A. Yes.

Q. White lights? A. Yes.

Mr. MacGillivray: Mr. Cashatt, may be stipulate, without bringing another witness, that this picture was taken at 8:20 p.m. on July 17, 1953?

(Testimony of James Crump.)

Mr. Cashatt: That is correct.

Mr. MacGillivray: No objection.

The Court: They will be admitted, then.

(Whereupon, the said photographs were admitted in evidence as Defendant's Exhibits Nos. 44, 45 and 46.)

Q. (By Mr. Cashatt): Mr. Crump, Exhibit No. 44, will you just step over here and tell the jury what that shows?

A. This is looking east toward our switching yard from just a little west of No. 13 Switch. This gentleman [903] (indicating) is standing at No. 13 Switch. As I say, looking east from that direction.

Q. And can you point out, Mr. Crump, if the Addison Miller dock is shown in Exhibit 44?

A. Yes, this here (indicating) is the Addison Miller dock.

Q. And the track, can you point out Track 13 if it is shown there?

A. That is Track 13 leading along there (indicating).

Q. And Exhibit 45, what is shown there, Mr. Crump?

A. This is a close-up picture of the area right just west of the Addison Miller dock. This is the beginning of the Addison Miller dock right here; this is No. 13 (indicating).

Q. Mr. Crump, you haven't seen this before, that is Exhibit 16, Plaintiff's Exhibit 16. Do you recognize what that shows? A. Yes.

Q. And now in Exhibit No. 45, will you point

(Testimony of James Crump.)

out where that particular building would be located, the general location as it is in 45?

A. This building, this sloping part is the same sloping part you see here (indicating). In other words, this building is just east of this light roof part of the building.

Mr. McKevitt: Have him identify the two exhibits [904] as you refer to them.

Q. (By Mr. Cashatt): The last that you told us about was off of Exhibit No. 45, Defendant's Exhibit 45? A. That's right.

Q. And will you point out again on Defendant's Exhibit No. 45 the sloping area that you pointed out in Exhibit No. 16?

A. This light area (indicating), the way the sunlight is directed against it, is the same slope that you see on this exhibit here.

Q. And when you said "this exhibit here," you meant Exhibit 16? A. That's right.

Q. Is the Addison Miller dock shown in Exhibit No. 46, the outline of the dock?

A. The outline, the silhouette, yes.

Q. And on the west end I see two lights. Do you recognize what those lights would be?

A. Well, those would be the lights illuminating the dock.

Q. The small lights right on Track 12 and Track 13 shown there, what would those be?

A. Well, that would be the blue lights.

Q. And this is, of course, a black and white picture, isn't it? A. Yes. [905]

(Testimony of James Crump.)

Q. And they don't show in color on this picture?

A. No.

Q. Now Exhibit No. 46, can you tell us from looking at Exhibit 46 from where it was taken?

A. At approximately the same spot you saw in this daylight picture of the gentleman standing by No. 13 Switch.

Q. Approximately the same location as Exhibit No. 44?

A. That's right, looking the same direction.

Q. Looking east? A. That's right.

Q. Now, Mr. Crump, on July 17, 1952, if the blue lights had been on the Addison Miller dock at the time the 14 cars were switched in, you believe that that would appear as it does in Exhibit 46?

A. Yes, it would be visible.

Q. If they were on? A. That's right.

Q. You may sit down again.

Now, Mr. Crump, from the location you were on July 17, 1952, when the 14 cars were proceeding down Track 13, if the blue light had been on at the Addison Miller dock, could you have seen it from that location? A. Very plainly, yes.

Q. Do you know, Mr. Crump, how many cars of salt the salt pit at the Addison Miller dock holds at one time? [906]

A. I believe four carloads.

Mr. Cashatt: You may inquire.

Cross Examination

Q. (By Mr. MacGillivray): Mr. Crump, you

(Testimony of James Crump.)

have been employed by the Yardley yards since 1937? A. That's right.

Q. About 90 per cent of the time?

A. Yes.

Q. And as I understand, that yard is what you refer to as a saucer yard?

A. That is correct.

Q. In other words, the yard from east and west slopes toward the center?

A. Uh-huh, that's right.

Q. And the center of the yard is approximately at the tunnel leading from the ice plant to the icing dock itself? A. Approximately, yes.

Q. And then did I understand you to say that although the center is at that point, that Track 13 from 13 Switch running east to the center of the yard runs uphill?

A. I said it would tend to run uphill more than the other direction. [907]

Q. I don't quite follow you, Mr. Crump. The center of the yard, the center of the saucer, is at the dock?

A. I am assuming that, yes.

Q. And it slopes down to that center?

A. Uh-huh.

Q. Well, doesn't that mean that Track 13 slopes to the center of that saucer?

A. I testified previously that No. 13 track is where our yard tends to level off. In other words, from 13 on over, it is not used as a saucer portion

(Testimony of James Crump.)

of our yard, and it was more apt to be level than anything.

Q. Well, in other yards, there is a break at 13 Switch and from 13 Switch on east to the center of the yard it is level, is that it?

A. State that again, please.

Q. There is a break in the downhill slope at 13 Switch and from that point east to the icing dock it runs level? A. Fairly level, yes.

Q. Then you spoke of this loudspeaker system, Mr. Crump, stating that you had loudspeakers in the center of the yard approximately just west of the Addison Miller dock? A. That's right.

Q. Did I understand that the speakers at that point face north and south? [908]

A. I believe that when I observed them when they were first installed, I helped the man, that is, helped with the use of my voice, testing them out, I believe they were facing north and south. I can't say for sure.

Q. When you tested them out, you can hear those loudspeakers all over the Yardley yards, can't you? A. No.

Q. Well, you can hear those loudspeakers at least 500 feet away without difficulty, can't you?

A. Without too much noise of exhaust of engines, bumping of cars, what not, normally.

Q. At least 500 feet? A. Yes.

Q. Now handing you Exhibit No. 15, aren't the speakers to which you refer in the center of the yard near the ice dock facing east and west?

(Testimony of James Crump.)

A. They are.

Q. And that is the condition as it existed on July 17, 1952, is it not?

A. Yes, apparently.

Q. And those loudspeakers are approximately 100 feet west of the icing dock, is that not true?

A. At least that much.

Q. How far would you say?

A. I would say more, 250 feet. [909]

Q. 250 feet? A. That's right.

Q. Well, at least, they are close enough to the icing dock that anyone on the icing dock would have no difficulty hearing any warning cast over the loudspeaker system?

A. If it were still, if there was no switching movements going on in that direct vicinity, why it is possible that they could hear my voice.

Q. Well, on July 17, 1952 immediately prior to turning these 14 cars loose up at the yardmaster's office, there was no switching going on on Track 13 or Track 12, was there?

A. Not to my knowledge.

Q. Then I understand that the loudspeaker system is used only to convey messages to employees of the Northern Pacific and no one else?

A. That's right.

Q. It would not be correct that for 8 years prior to July 17, 1952, that loudspeaker system had been used to advise of the movement of cars so far as anybody was concerned?

A. It wouldn't be correct to say that, no.

(Testimony of James Crump.)

Q. I see. Then you made the statement that you are always alert for the blue flag or blue light at the Addison Miller dock? [910]

A. That's right.

Q. Now you have blue lights and blue flags, do you not? A. Yes.

Q. The blue flags are used in the daytime and the blue lights are used at night? A. Yes.

Q. And the reason for that is that during the daytime you can't see a blue light?

A. That's right.

Q. You made the statement, Mr. Crump, that at the time you turned the 14 cars loose from Old Main in front of the yard office onto the lead down onto Track 13 on July 17, 1952, it was still daylight?

A. Dusk, it was getting dark. The light would be at my back if I were looking toward the ice dock at 13.

Q. Well, you made the statement it was still daylight, is that a correct statement?

A. Well, I am only distinguishing between daylight and dark. It was tending to get toward dark.

Q. Well, if it was daylight, you couldn't see any blue light, could you?

A. With the light at my back, yes.

Q. You could?

A. I couldn't see it in the morning facing the sunlight.

Q. I see. Do they use any blue flag down at the Addison [911] Miller dock? A. Yes.

(Testimony of James Crump.)

Q. They do?

A. In daylight hours. That is what you just said.

Q. Is there a blue flag present on the west end or any blue flag at either side on the west end of the Addison Miller dock?

A. I couldn't say.

Q. Well, don't you know that there is not and never has been?

A. The blue flag rule says that a blue flag should be used in the daytime.

Q. Now the question, do you know that there is not, there was not on July 17, 1952, and never has been a blue flag? A. I don't know that.

Q. Present on the Addison Miller dock?

A. I don't know that.

Q. You didn't know that there ever was, either, did you? A. No.

Mr. Cashatt: If your Honor please, I am going to object to this. My understanding is they don't put the blue flag on top, they put it on the track, and I don't think that is a fair question.

The Court: Well, you may bring that out on redirect [912] examination, if that is the case.

Q. (By Mr. MacGillivray): Then you said, Mr. Crump, that it is customary to phone from the dock to the yard office whenever men are working on and around the icing dock, is that correct?

A. They notify me, yes.

Q. Well, that is a system that has been inaugurated since July 17, 1952, is it not?

(Testimony of James Crump.)

A. No.

Q. That was the system before then?

A. Yes. The phone.

Q. Pardon? A. The phone.

Q. In other words, if that is correct, Mr. Crump, you didn't rely on the blue flag or blue light system, did you? A. Strictly.

Q. Well, what was the purpose of the phone calls, then?

A. To have a complete understanding. In other words, that is the only means they had of notifying us they were about to service cars or had completed their service.

Q. I see. And prior to July 17, '52, did you have a custom of advising the Addison Miller dock from the yard office over the phone system that free cars were being shunted onto and drifted down Tracks 12 and 13? [913] A. No.

Q. Well, to advise from the yard office to the icing dock, either by phone or by the loudspeaker system, that advice could be given in a matter of seconds, couldn't it? A. Yes.

Q. Yes. Then, Mr. Crump, you have been, during this 15 year period prior to 1952, around that icing dock a lot? A. Many times.

Q. And you are familiar with the fact, as is shown on Exhibit No. 12 here, that immediately to the north of Track 13 there was a common dumping ground? A. That's right.

Q. And you were familiar with the fact, Mr. Crump, that for several years prior to '52, when

(Testimony of James Crump.)

they were using paper sacks for salt, that those paper sacks, after having been emptied in the icing operation, were taken over and dumped in that common dumping ground?

A. I didn't know that.

Q. Well, do you mean that you have never seen paper salt sacks in that common dumping ground prior to 1953, July?

A. I cannot say definitely that I have or haven't seen it. The refuse from boxcars being cleaned in that area is [914] normally what you see in this picture.

Q. Don't you see salt sacks in that picture?

A. I didn't look at it closely. I can't see that it designates the salt sacks; it is merely paper here.

Q. Can't you see any salt sacks in that picture?

A. Not distinguishable, no.

Q. I see. Well, Mr. Crump, didn't you know as a fact that you had seen prior to July, 1952 salt sacks that had been dumped in that common dumping ground by Addison Miller employees?

A. I don't remember of ever noticing salt sacks in that area.

Q. And didn't you know and realize that to dump those salt sacks north of Track 13, someone had to carry them across Track 13 to that common dumping ground?

A. As I stated, I didn't know it was the practice of dumping them there.

Q. I see. And, as a matter of fact, over this 15 years of your experience there at the Yardley

(Testimony of James Crump.)

yards, hadn't you often seen slush ice in that common dumping ground north of Track 13?

A. Never to my knowledge.

Q. Never to your knowledge?

A. That's right.

Q. Is it that you don't recall, or are you positive you [915] have never seen that in that 15 years of service?

A. I will say I don't' recall.

Q. You don't recall. Well, if you had seen that, the presence of slush ice in that common dumping ground over this 15 years of your experience prior to 1952, you knew and realized that to get that ice there from the slush pit in the icing dock, someone had to carry it across Track 13 to that dumping ground, did you not?

A. Yes, it would have to be carried by someone.

Q. Yes. And anyone in authority at the Yardley yards, employees of Northern Pacific, would have that same realization, seeing that situation existing, isn't that correct?

A. They would realize it, yes.

Mr. Cashatt: I object to that, your Honor, as to what refers to others there.

The Court: Well, I will overrule the objection. He has answered.

Q. (By Mr. MacGillivray): Then you made the statement, Mr. Crump, that the white lights on the top of the Addison Miller dock when illuminated meant to you that men were working on or around

(Testimony of James Crump.)

that dock in preparation for icers or refrigerators later to be spotted on either Tracks 12 or 13?

A. That's right. [916]

Q. When you spoke of men, you meant men and boys, didn't you?

A. I don't distinguish between the employees by their age.

Q. Well, from your 15 years experience, didn't you know that Addison Miller continuously during the summer months hired and used high school kids out on that icing dock?

A. I was not aware of that.

Q. You were not aware of that? A. No.

Q. Over the whole 15 years?

A. That's right.

Q. Did you pay any attention at all at any time to the employees of the Addison Miller Company, whom they might be and the ages they might be?

A. I was concerned merely with my own work, I didn't take any particular notice.

Q. I see. Then on the evening of July 17, 1952, immediately prior to the time these 14 cars were turned loose and drifted onto Track 13, the white lights on the top of the Addison Miller dock were illuminated, were they not?

A. I don't remember for sure, I couldn't say that statement for sure.

Q. Well, didn't you look? [917]

A. I looked down there to observe the blue lights.

Q. You just can't remember?

(Testimony of James Crump.)

A. I can't remember that there were white lights, no.

Q. Well, if there had been white lights illuminated on the top of that dock when you looked down there before you gave instructions to turn those 14 cars loose, that meant to you that there were men working on and around that icing dock, did it not?

A. Yes.

Q. Now as I understand, Mr. Crump, a fruit train came in at 4 p.m. that afternoon?

A. That's right.

Q. Composed of how many refrigerator cars?

A. 55, I believe it was, or 56.

Q. And those, necessarily, would have to be and were iced both on the north and south sides of the icing dock? A. That's right.

Q. And that icing operation was completed sometime between 6 and 7 p.m.? A. Yes.

Q. And in your 15 years experience, you are familiar with that icing operation? A. Yes.

Q. And what has to be done in preparation for an icing operation? [918] A. Yes.

Q. Now from your records, will you tell us when the next refrigerator cars were due in at the Addison Miller dock the evening of July 17, 1952 after 7 o'clock?

A. I can only go by what has been testified here before. It was about 9 something, I couldn't say.

Q. Well, is this the record, that it will show in this large book?

Mr. Cashatt: You haven't the right date.

(Testimony of James Crump.)

A. No, it would be this record here, I believe (indicating).

Q. (By Mr. MacGillivray): Well, refer to the record and tell us.

A. You want to know when the next car was serviced?

Q. Pardon?

A. You want to know when——

Q. Yes, when the next cars were due in there for icing purposes after 7 p.m. that evening?

A. Well, looks like it is about 11:30 p.m.

Q. 7:30 p.m.? A. 11:30 p.m.

Q. 11:30? A. Uh-huh.

Q. Wasn't there something due in at 9:35?

A. I don't see it here, unless I am overlooking it. I [919] don't see any time of 9:35.

Q. Was that a fruit train due in at 11:30?

A. Oh, no—at 11:30 it was, but not this time you speak of at 9:35.

Q. Well, what was due in at 9:35?

A. That I couldn't say. I imagine it was one load or several loads off of another train, either east or eastbound, not a fruit train.

Q. I see. Well, when would you have received advice in the yardmaster's office that there were some icers coming in at 9:35?

A. If they came in on the S. P. & S. train, I had no notice, but on the N. P. trains—both of them came in the N. P. yards at Yardley—on the N. P. trains, I have approximately an hour and a half's notice.

(Testimony of James Crump.)

Q. Hour and a half's notice?

A. That's right.

Q. When you receive that notice, you convey that information to the icing dock?

A. To the ice foreman.

Q. Yes. A. Uh-huh.

Q. Well, your ice foreman, you mean?

A. He takes care of that part, yes.

Q. In any event, if that information was received an hour [920] and a half before the train comes in, that is conveyed to your ice foreman, he in turn conveys it to the Addison Miller foreman?

A. That's right.

Q. And when did you receive advice that a fruit train was coming in at 11:30?

A. We have an operator on duty at the Yardley yard and he brings in a written notice.

Q. About what time did you receive that advice?

A. The train arrived at 11:30, so I am going to say 10 o'clock. That is pretty close.

Q. This 4 o'clock fruit train was pulled out of Tracks 13 and 12 about 7 o'clock and went on its way?

A. The train departed at a little after 7, yes.

Q. And you, of course, knew that there had been 55 icers iced in that operation completed sometime between 6 and 7? A. That's right.

Q. You knew, also, did you not, Mr. Crump, that the employees of Addison Miller generally went to lunch about 7:30 o'clock on the 3 to 11 shift?

A. No, I didn't know that.

(Testimony of James Crump.)

Q. Well, isn't that the time that you fellows have your lunch on that shift, approximately?

A. No, we go to lunch 4 hours and 30 minutes or after. Any [921] time after 4 hours and 30 minutes after we go to work. We don't have any definite time to go to lunch.

Q. Well, that would be at any time from 7:30 on? A. For me, you mean?

Q. Yes.

A. It would have been for me if I had found time, yes.

Q. Well, didn't you know that same practice was followed at the Addison Miller dock?

A. No. I don't know, that is a separate company.

Q. Well, you did know that after the fruit train left at 7 p.m., that it was then necessary, whether before lunch or after lunch, for Addison Miller employees to get that icing dock in shape to service icing cars that came in that evening after 7 p.m.?

A. That was their practice, yes.

Q. Well, you knew that, didn't you?

A. Yes.

Q. And so you knew that at 8:20 p.m. when you turned those 14 cars loose up at the yardmaster's office that that work would be in progress at the Addison Miller dock?

A. I didn't know of any specific work going on.

The Court: We will have to suspend this case now until 2:30. We have a naturalization hearing at 1:30 that will last at least an hour, so I will excuse the jury and suspend this case until 2:30 this

(Testimony of James Crump.)

afternoon. Come back at [922] 2:30 this afternoon.

(Whereupon, the trial in the instant cause was recessed until 2:30 o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to recess, all parties being present as before, and the following proceedings were had, to-wit:)

The Clerk: Mr. Crump.

JAMES CRUMP

having previously been sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. MacGillivray): Mr. Crump, I believe you had just told us that this 4 o'clock fruit train was pulled out of 13 about 7 o'clock at night of July 17th?

A. It departed shortly after 7. [923]

Q. And you have also told us that from your 15 years experience at the yard and with the icing operation, you knew that shortly after 7 p.m. the employees at the icing dock would start to prepare that dock for the arrival of the next fruit cars or fruit train of reefers?

A. Apparently they did. I didn't know of any specific time that they would start making preparations.

Q. Well, you knew, did you not, Mr. Crump, after 7 o'clock that night, this 56-car reefer train

(Testimony of James Crump.)

having pulled out, that within a reasonable period of time after that, the icing employees on the dock would start to prepare that dock for the 9:35 or the 11:35 train that came in? A. Yes.

Q. And you knew that fact, Mr. Crump, at 8:20 and 8:15 p.m. that evening? A. Yes.

Q. And you knew that fact when you turned these 14 cars loose on the Old Main in front of the yard office drifting toward Track 13?

A. Yes.

Q. And these records that you have—I forget the exhibit number—that you keep as to cars in the yard at any given period of time, those are kept by the assistant yardmaster on duty? [924]

A. That's right.

Q. All those records show, Mr. Crump, is what cars might be in the yard and their approximate locations at 7 o'clock in the morning, at 3 o'clock in the afternoon, and at 11 o'clock at night?

A. Yes.

Q. You do not keep any records as to the movements of cars and the location of cars between those respective times?

A. Only a mental record, which a yardmaster has to have complete knowledge of the capacity of a track and approximately how many cars are on that track, what position on the track they are standing, whether it be in the middle, west, or the east end.

Q. Do you have a record kept in the yard-

(Testimony of James Crump.)

master's office as to what cars were on Track 13 at 8:15 p.m., July 17, 1952?

A. Do we have a record, you say?

Q. Yes? A. Not that I know of, no.

Q. So that when you say there was no salt car on Track 13 at 8:15 p.m. on July 17, 1952, you are depending on your recollection of two years ago?

A. Yes, I am depending on my knowledge as yardmaster by looking down and ascertaining that the track was clear [925] when that movement was made.

Q. Then, Mr. Crump, regardless of the presence of a salt car on Track 13 at 8:15 p.m. that evening, you knew, did you not, that in preparing the icing dock for cars, that is, reefer cars that would come in later that evening, that in the ordinary course of events, salt would be taken from the salt pit up on to the dock in the elevator? A. Yes.

Q. And you were thoroughly familiar with just where that salt pit was located with reference to Track 13 and how that operation was conducted?

A. Yes.

Q. At 8:15 p.m. on July 17, 1952, immediately before you turned those 14 cars loose, did you take into consideration that men and boys, maybe five, six or seven in number, would be working in that open doorway and at the salt elevator within the space of two or three feet of any cars that might then be spotted on Track 13?

A. I knew that in order to bring salt up to the

(Testimony of James Crump.)

dock, that it would have to be loaded on through the doorway, yes.

Q. Did you take that fact into consideration before you ordered those 14 cars turned loose onto Track 13?

A. This track being a trainyard track—— [926]

Q. Did you take that into consideration?

A. I don't know as it is necessary to consider.

Q. The question is, Mr. Crump, did you take it into consideration or did you not?

A. I will say I didn't.

Q. You didn't? A. I didn't.

Q. Mr. Crump, you spoke about blue lights. You have a blue light rule in the operating rules?

A. That's right.

Q. And are you familiar with the operating rule book? A. Yes.

Q. Are you familiar with Rule 805?

A. Not by number.

Q. By contents? A. Beg pardon?

Q. Are you familiar with it by its contents?

A. Yes.

The Court: A copy may be substituted.

Q. (By Mr. MacGillivray): Mr. Crump, were you familiar with that section of Rule 805 of the Consolidated Code reading as follows: "Before moving cars"——

Mr. McKevitt: Your Honor, for the purpose of the record, the defendant objects to the introduction of that [927] rule or any portion thereof into this case as not being within the issues. It has

(Testimony of James Crump.)

not been pleaded and it is not contended or asserted that we violated any rule that was enacted for the benefit of Addison Miller employees.

The Court: All right, the record will show the objection. Overruled.

Q. (By Mr. MacGillivray): Mr. Crump, were you on July 17, 1952 at 8:15 p.m., immediately before you turned these 14 cars loose in front of the yard office, familiar with that section of Rule 805 of the Consolidated Code reading as follows: "Before moving cars or engines in a street or a station or yard track, it must be known that they can be moved with safety." A. Yes.

Q. And were you familiar with this section of Rule 805: "Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone."

A. Yes.

Mr. MacGillivray: Ask, your Honor, the admission of the quoted sections of Rule 805 of the Consolidated Code. A [928] copy of the sections can be substituted for the complete Consolidated Code to be placed in evidence.

Mr. McKevitt: Same objection as we previously stated.

The Court: Yes, the record will show the same objection, and it will be overruled and the exhibit admitted. That is 47, isn't it?

The Clerk: That is 47. Now I have marked Plaintiff's 48, 49 and 50 for identification.

(Testimony of James Crump.)

(Whereupon, the said sections of Rule 805 were admitted in evidence as Plaintiff's Exhibit No. 47.)

DEFENDANT'S EXHIBIT No. 47

The Consolidated Code of Operating Rules and General Instructions
Edition of 1945

(Excerpt from Sec. 805, page 190)

Before moving cars or engines in a street, or on station or yard tracks, it must be known that they can be moved with safety.

Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone. When cars are moved, they must be returned to their former location unless otherwise provided,

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Q. (By Mr. MacGillivray): Mr. Crump, relying on your recollection of two years ago or as of July 17, 1952, I understand it is your testimony that immediately prior to your turning these 14 cars loose, there were 9 cattle cars on Track 13 adjacent to the icing dock? A. That's right.

Q. Did you go down to the icing dock after this accident occurred? A. No.

Q. Did you see deputies from the Spokane

(Testimony of James Crump.)

County Sheriff's [929] office out making an investigation out there? A. No.

Q. Mr. Crump, do you know it to be a fact that the cars between which Gerald Stintzi was caught by the impact of the 14 cars you had turned loose were Pennsylvania Railroad Car No. 77346 and Car No. 56160?

A. You say do I know that that was where he was injured?

Q. Yes? A. I do not.

Q. Between those two cars?

A. I do not know that, no.

Q. Handing you what is Plaintiff's Exhibit No. 50, a picture taken by the defense, have you ever seen that picture before? A. Yes.

Q. And you see in that Pennsylvania Car 77346?

A. Yes.

Q. Is that a stock car?

A. No, it is a boxcar.

Q. Well, don't you know as a fact that that Car 77346 was on Track 13 at and prior to 8:15 p.m., July 17, 1952?

A. This Pennsylvania Car 77346 is the most easterly car of the cut of 14 that they released up close to the yard office that drifted into No. 13.

Q. You are sure of that? [930]

A. I am sure of that.

Q. And you have no record, do you, of any of the numbers of any of the cars that were on Track 13 prior to 8:15 p.m. on the night in question?

A. Well, I believe if Mr. Prophet's switch list was

(Testimony of James Crump.)

ever brought up in this trial, that it would show.

Q. I mean the cars that were spotted there prior to 8:15, prior to turning loose the 14 cars?

A. Well, that should be—yes, there should be a check of those, of the cattle cars.

Q. Where would that be?

A. Well, I have seen the numbers of them, the ones that were pulled from the Armour stock track.

Q. Do you mean you have a record there at the yard office of the numbers of the cars on Track 13 prior to the time you turned these 14 cars loose?

A. I am only saying that I happen to know that I have seen the numbers of the stock cars in question, the ones that were placed on that track.

Q. On what record?

A. It was made on a switch list, a switch list I made out myself.

Q. That record hasn't been produced here, has it?

A. Not in the time that I have been here, no.

Q. Pardon? [931]

A. Not in the two days that I have been here.

Q. Then handing to you Plaintiff's Exhibit No. 48, a picture taken by the defense, have you seen that picture before? A. No.

Q. Can you identify the track shown in that picture? A. No.

Q. Can you identify the metal object on that track? A. No, I can't.

Q. Handing you what is marked as Plaintiff's Exhibit 49, have you seen that picture before?

(Testimony of James Crump.)

A. No, I haven't.

Q. Can you identify that track?

A. By the looks of the building here, it would be Track 13.

Q. Looking in which direction?

A. Well, now, let's see. Well, it would be looking in a westerly direction.

Q. Do you see any salt sacks in the picture?

A. I do in this picture, yes. One.

Q. And that salt sack is which direction from Track 13?

A. It is on the north side, this one sack.

Mr. Cashatt: I object to testifying what the picture is, Your Honor, when it isn't admitted in evidence.

Mr. MacGillivray: Well, I will ask the admission of [932] Plaintiff's Exhibit No. 49, taken by the defense.

On what day, Mr. Cashatt?

Mr. Cashatt: I don't know the date, Mr. MacGillivray.

Mr. MacGillivray: I ask its admission.

Mr. Cashatt: But I object to the offer of the exhibit, your Honor, until it is properly identified.

The Court: Well, I think it should be identified as to place and time of taking.

Mr. MacGillivray: If I knew who took it, I would do that, your Honor.

I presume the same objection would be made to 48 and 50?

Mr. Cashatt: That is correct.

(Testimony of James Crump.)

Q. (By Mr. MacGillivray): Well, Mr. Crump, one thing I think we have overlooked, would you step down here, please, sir?

Were you here when Switchman Craig testified yesterday, I believe? A. Yes.

Q. You heard his testimony.

The Court: It is hard to hear down at this end.

Q. (By Mr. MacGillivray): Did you hear his testimony that as the 14 floating cars went into and over Switch 13, he was standing opposite and 40 feet to the north of [933] Switch 9?

A. Yes, I heard that.

Q. Would you mark on that map just where Switch 9 is?

A. I would say this is Switch 9 (indicating).

Q. Would you write that in there?

A. (Witness complies).

Q. Thank you, sir. Step back.

Mr. Crump, when these 14 cars were turned loose in front of the yard office, were you in the office or outside? A. I was outside.

Q. And when they were turned loose, they were traveling about 3 miles per hour?

A. Very slowly, yes.

Q. Was that about the speed?

A. I would say that is pretty close.

Q. As a matter of fact, they were traveling so slowly that you wondered whether they would make it down to the ice dock on Track 13?

A. That is correct.

Q. The distance from the yard office to the ice

(Testimony of James Crump.)

dock is, as has been testified to, approximately 2,050 feet? A. That is pretty close.

Q. And, mathematically, traveling at 3 miles per hour, those floating cars would travel down the Old Main onto [934] the lead and into Track 13 at approximately 264 feet a minute; is that about right?

A. I will take your word for it, I haven't figured it.

Q. Well, what I am getting at, Mr. Crump, from the time those cars left the front of the yard office, it would take approximately 8 minutes for them to reach the icing dock?

Mr. McKevitt: Object, that is a matter of computation. If the witness on the witness stand can do it, why all right, but I doubt if he can.

The Court: Can you answer that without computation?

A. Not without figuring it out.

Q. (By Mr. MacGillivray): Well, let's see, 5,280 feet in a mile; 3 times that would be 15,840 feet.

A. Uh-huh.

Q. That those cars would travel in an hour at 3 miles per hour, is that correct? A. Yes.

Q. Dividing that by 60, you find out how much that traveled per minute. You might use my computations here. Is it not true that those cars would travel 264 feet a minute?

A. Yes, sir, according to the figures.

Q. So from the time they were turned loose until the time they had reached the ice dock would

(Testimony of James Crump.)

take approximately [935] 8 minutes, is that not correct?

Mr. McKevitt: Objected to as argumentative, your Honor.

Q. (By Mr. MacGillivray): Well, figure it out.

Mr. McKevitt: Just a minute, Mr. Gillivray.

Q. (By Mr. MacGillivray): Take your time, Mr. Crump, figure it out and tell us how many minutes it would take those cars at 264 feet per minute to go down 2,050 feet to that ice dock.

Mr. McKevitt: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overrule the objection.

A. Assuming it was exactly 3 miles per hour, that would be correct, it would be—let's see—264 feet per minute, divided into the length of it, would be, as you say, about 8 minutes.

Q. (By Mr. MacGillivray): About 8 minutes?

A. If it was 3 miles per hour exactly, yes.

Q. And what you and Mr. Prophet did after those cars were turned loose was to turn around and go to lunch?

A. I stayed there, yes, after the cars were definitely in the clear, we both——

Q. Just left and went to lunch?

A. That's right, he did and I went back in the office.

Mr. MacGillivray: That is all. [936]

Redirect Examination

Q. (By Mr. Cashatt): Mr. Crump, how far were

(Testimony of James Crump.)

the cars from the ice dock when you went back into the office? A. All of the cars?

Q. The first car to the east on this string of 14?

A. You want to know where the most easterly car was?

Q. Yes?

A. Well, I would say it was at least 15 car lengths into the track.

Q. And in feet, can you give it? Counsel has used in his computation here a figure of 2,050 feet.

A. Well, I would say, then, that easterly car of that cut of 14 was—let's see—about 600 feet, perhaps.

Q. So if you divided 264 into 600 feet, you would have about two minutes and a half, wouldn't you?

A. Uh-huh.

Q. Instead of 8. Now counsel asked you about a Pennsylvania Boxcar No. 77346. Handing you Exhibit No. 25, do you recognize that?

A. Well, this is the switch list that I wrote out, it is my handwriting, and gave to Foreman Prophet to take care of this move, moving of the cars from Track 43 to 13.

Q. And there are 14 cars listed on that list, are there? [937] A. Yes.

Q. And what is the number of the car that was the first car to go down Track 13 of those 14 cars? What is the number?

A. The easterly car was 77346. That was the Pennsylvania car.

Q. And so that car, Mr. Crump, was in the 14

(Testimony of James Crump.)

cars and was not on Track 13 when this switch movement started?

A. No, that was in the 14 cars.

Mr. Cashatt: I will offer Exhibit No. 50.

Mr. MacGillivray: Is that the exhibit you just objected to?

Mr. Cashatt: No, I didn't object to that one. You asked me about the others and I did object. That was the one you were talking to Mr. Crump about.

Mr. MacGillivray: Were these other pictures taken at the same time?

Mr. Cashatt: I believe they were.

Mr. MacGillivray: By the same person?

Mr. Cashatt: They were marked taken by Libby.

Mr. MacGillivray: I have no objection to Exhibit 50 if Exhibits 48 and 49 go into evidence at the same time.

Mr. Cashatt: I am confining my offer only to 50.

The Court: I think it should be admitted. It has been definitely identified by the witness as a particular [938] car. I assume the appearance of a freight car wouldn't change very much from time to time.

Mr. Cashatt: I will identify the picture further, your Honor.

Q. Handing you Exhibit No. 50, is that the Pennsylvania Car 77346 that you have listed on Exhibit No. 25, which you have told us was the first car to the east on the string of 14 cars that Mr. Prophet switched in on Track 13?

(Testimony of James Crump.)

A. It is the same car.

Q. Mr. Crump, counsel asked you if the white lights on the dock indicated to you that men were working around the dock. What is your answer to that question? A. Well, yes, they would be.

Q. Counsel, from his question, he had both of these things into one, so I will ask another question.

When the white lights are on the dock, does that indicate to you that men are working on or about cars?

Mr. MacGillivray: Objected to as repetitious. He said at least three times that it didn't.

Mr. Etter: That's right.

The Court: Overruled.

Mr. Cashatt: You chopped them all into one; I am going to separate them.

The Court: Overruled. [939]

A. That doesn't apply to working around cars.

Q. (By Mr. Cashatt): If the blue lights are on and the white lights are on at the same time, what does that indicate to you?

A. Well, the blue light means that these employees down there are apt to be working on or about the cars.

Q. Do you mean refrigerator cars?

A. Yes.

Q. Or salt cars? A. Or salt cars, yes.

Q. Now when the white lights are on the dock at night, does that give you any reason to anticipate that anybody is on the ground crawling under the couplers of stationary cars on Track 13?

(Testimony of James Crump.)

A. No.

Q. Counsel asked you some questions about the blue flag. In the daytime when they use the blue flag, is that attached to the dock or is that attached to the track?

A. In the daytime it would have to be attached to the track itself.

Q. And at night they use the blue light, is that correct? A. That's right.

Q. Counsel referred to a common dumping ground. Is there any such thing in the yards out there as a common dumping ground? [940]

A. Well, I wouldn't say "common." It is the refuse taken from the cars coming into our repair tracks and cleaning tracks—paper, pieces of boards and such as that—that is, the dumping is done there.

Q. And that debris, does that come from Northern Pacific freight cars?

A. From freight cars accepted in our cleaning tracks, yes. Not just Northern Pacific cars, boxcars.

Q. But any freight cars that are in your yards, is that right? A. That's right.

Q. Counsel showed you Exhibit No. 16, Mr. Crump, and asked you if you had in mind the fact that men might be working in this salt house at the time you put the 14 cars in motion down Track 13. Do you recall that? A. Yes.

Q. Now if they were working in the salt house or salt pit, would they be anywhere close to or around Track 13? A. They shouldn't be.

(Testimony of James Crump.)

Q. Would they be inside the building itself?

A. Yes, they would be working within the boundaries of the building.

Q. And they would not be outside, is that right?

A. They shouldn't be, no.

Mr. Cashatt: I will go ahead, your Honor, and ask a [941] few questions in between.

The Court: All right.

Q. (By Mr. Cashatt): Mr. Crump, counsel asked you some questions in regard to Rule 805. Does that rule say anything at all about members of the public or employees of Addison Miller or anybody else crawling under the couplings of stationary cars on tracks located in your switch yards or anywhere else?

Mr. MacGillivray: Just a minute. I object to that question on the ground that the rule speaks for itself, your Honor.

The Court: Well, I will overrule it, he may answer. You read only part of it.

A. This Consolidated Freight Code Rule covers only the N. P. employees, to my knowledge.

Mr. Cashatt: Your Honor, in view of the fact that they have introduced only a portion of Rule 805, I move that the entire rule of 805 be admitted to show that it had no application to the plaintiff in this case.

The Court: May I see that?

(Document handed to Court.)

Mr. Cashatt has offered the rest of Rule 805.

Mr. MacGillivray: No, no objection at all.

(Testimony of James Crump.)

Mr. Cashatt: Without waiving our previous objection to it, your Honor. [942]

The Court: Yes, all right. I don't see that it is material, but if you want it in, it is all right with me.

Mr. Cashatt: I would like to have the whole thing.

Mr. MacGillivray: We want to keep them happy.

The Court: Standing by bridges and churches, and so on.

All right, it will be admitted, then.

The Clerk: That will be Defendant's Exhibit 51, your Honor.

The Court: That will be Defendant's 51?

The Clerk: Yes, sir.

(Whereupon, the remaining portion of said Rule 805 was admitted in evidence as Defendant's Exhibit No. 51.)

DEFENDANT'S EXHIBIT No. 51

The Consolidated Code of Operating Rules and General Instructions
Edition of 1945

805. When it can be avoided, engines must not stand within 100 feet of a public crossing, under bridges or viaducts, or in the vicinity of waiting rooms, telegraph offices, or near cars which are occupied by passengers.

Before moving cars or engines in a street, or on

station or yard tracks, it must be known that they can be moved with safety.

Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone. When cars are moved, they must be returned to their former location unless otherwise provided.

Cars containing livestock must not be switched unnecessarily or cut off and allowed to strike other cars.

Care and good judgment must be used in switching cars to avoid damage to contents and equipment, and it must be known that necessary couplings are made and that sufficient hand brakes are set.

When switching at stations or in yards where engines may be working at both ends of the track, movements must be made carefully and an understanding had with other crews involved.

When switching or placing cars they must not be left standing so close as to not fully clear passing cars on adjacent tracks or cause injury to employees riding on the side of cars. Cars must not be shoved blind or out to foul other tracks unless the movement is properly protected.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. MacGillivray): Mr. Crump, do I understand from you that the safety rules con-

(Testimony of James Crump.)

tained in the Consolidated Code, as applied by the Northern Pacific Railway, are only for the protection of Northern Pacific employees?

Mr. McKevitt: He is referring to Rule 805, if I [943] understood him right.

A. I did not mean to say that it was for the protection of only the employees, no, but it is the employees who have to abide by these rules.

Q. (By Mr. MacGillivray): Well, you made some remark that Rule 805 applied only for the protection of N. P. employees?

A. I was referring to the blue light, which means when the N. P. employees are working on or about cars in the yard, why we respect that blue light. I didn't mean to infer that no one else would be allowed any protection.

Q. Do I understand, then, that the blue light rule is only for the protection of N. P. employees?

A. No, there would be other employees that would be affected if they were protected by a blue light. They wouldn't have to be N. P. employees.

Q. Well, aren't your safety rules that you are supposed to abide by, including Rule 805, passed for the guidance and protection of all employees and of the public? A. I suppose, yes.

Q. Isn't that correct? A. Yes.

Q. As a matter of fact, you can be sure on it, don't you have a Northern Pacific Railway Company "Safety Rules [944] and Admonitions?"

A. Yes.

Q. And aren't you told on the booklet itself

(Testimony of James Crump.)

that those are for the protection not only of your employees, but for the public generally?

A. Yes, sir.

Q. That includes Rule 805, doesn't it?

A. Yes, it would, I suppose.

Q. Then, do I understand that you have some place in the Northern Pacific records a sheet similar to this showing the numbers of the cars that were on Track 13 prior to 8:15 p.m., July 17, 1952?

A. These 14 cars would not show on a check of No. 13?

Q. No, you misunderstood me. There were some number of cars on Track 13 prior to the time these cars were drifted in? A. Yes.

Q. Well, do you have some place in the N. P. records a sheet similar to this showing the number of cars on Track 13 and their numbers prior to the time that these 14 were drifted in?

A. The record, I believe, would be covered by a yard check taken of the Armour stock track where these 9 cattle cars came from. That would be a check of it or record of it, as you say. [945]

Q. Wouldn't you have a record like this drawn up as instruction to the switchmen showing the numbers and the number of cars that were switched into Track 13 between 7 p.m., when the fruit train left, and 8:15 p.m., when these 14 were switched in there?

A. As I stated before, there would be that check of them, yes.

Q. Well, where is that record?

(Testimony of James Crump.)

A. Well, that would naturally be the N. P. records. It comes out on a list similar to this.

Q. Well, where is it?

A. I couldn't say, I didn't present this.

Q. Nobody ever asked you to bring it down here? A. No.

Q. Just one more thing, Mr. Crump. You say that when you have six or seven Addison Miller employees, men and boys, working in the salt pit taking salt up in the elevator, that they are not in the vicinity of Track 13?

A. They are not supposed to be.

Q. What do you mean they are not supposed to be?

A. They should be a safe distance away from the track where there is proper clearance so as to not be close to those cars, moving or standing still.

Q. Well, just step down here and point out to the jury [946] where they are working, five, six, or seven men working in that elevator pit and around the elevator?

A. If there is five or six or seven men working, most of them will be working inside of the limits of this building, and then possibly one or two men loading it onto this shaft that takes the salt up. It is controlled by a hoist, electric motor.

Q. Just point out here to the rest of the jury what you are talking about, the openings we are talking about.

A. Most of the men would be working inside this building (indicating) bringing salt over to this

(Testimony of James Crump.)

hoist, and one or two men, I suppose, would take the salt and load it onto this hoist, standing right here.

Q. And those men would be within 3 feet, at the outside, of any cars standing on that track 13 opposite that salt pit?

A. They should be at least 3 feet, yes.

Q. Well, they would be not more than 3 feet from it?

A. I never had occasion to notice the clearance. That would be probably pretty close.

Q. Well, did that enter your mind when you turned these 14 cars loose the evening of July 17, 1952?

Mr. McKevitt: Same objection as to what he had in mind.

The Court: I think it is repetition. [947]

Mr. MacGillivray: Well, it might be.

Q. Did you consider also that Addison Miller employees working in the salt pit, just as Northern Pacific switchmen, take time out once in awhile?

Mr. Cashatt: I object to that, your Honor.

Mr. McKevitt: How does Mr. MacGillivray know how much time they take?

The Court: I will sustain the objection.

Mr. MacGillivray: That is all, Mr. Crump.

Redirect Examination

Q. (By Mr. Cashatt): Oh, say, by the way, Mr. Crump, when you made up this switch list, Exhibit No. 25, who did you give that to?

(Testimony of James Crump.)

A. This switch list was given to Foreman Prophet.

Q. And that switch list does not come back as a company record, is that right?

A. No, this is just used until this move is completed, normally, and that is his records of the cars that I want moved and placed in a certain track.

Q. And the switch list that you made up for the movement of the 9 stock cars, or did you make one up for the movement of the 9 stock cars that came in?

A. It so happens that I did not. That is made up by a clerk. [948]

Q. And was that given to the switchman?

A. That's right.

Q. And after he uses it, does he return that switch list to the yard office?

A. No, I don't believe he does.

Q. And is there any Northern Pacific record, if the switch list isn't saved, that would show those 9 stock cars on Track 13 at the time we have been talking about here?

A. There is no record at that time, no.

Q. And the record you mentioned to Mr. MacGillivray, was that what you call the car spot record that is made at a certain time each day?

A. The yard check, yes.

Q. And if the cars had been moved off of Track 13 before 11 p.m. on the evening of July 17, '52, would there be any record of that?

A. Not if they were moved off of that track, no.

(Testimony of James Crump.)

Q. Now on Exhibit No. 16 that counsel mentioned, when the men are loading in the location you pointed out, Mr. Crump, that is where the elevator was? A. That's right.

Q. When they are there, they are actually working in a portion of the building, isn't that right?

A. That's right.

Q. And they are not working on the railroad track or out [949] close to it, are they?

A. Not on the track or shouldn't be close to it, no.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. MacGillivray): Mr. Crump, just briefly, to get this straight in my own mind, at least, this was a list made out by you and given to Switchman Prophet when you ordered him to switch 14 cars off Track 43 onto Track 13?

A. That's right, it shows that.

Q. And when any switch of that nature is made, cars from one track to another, it is done in that same manner? A. Yes.

Q. And when the fruit train left at 7 p.m., Track 13 was clear? A. Yes.

Q. So between 7 p.m. and 8:15 p.m., immediately prior to turning these cars loose, cars had been switched from some other track into Track 13?

A. 9 stock cars, yes.

Q. When you gave the orders—and you were the boss at that time? A. That's right.

(Testimony of James Crump.)

Q. You gave the orders to what switchman to switch them? [950] Did you give them to Prophet?

A. For this cut of cars?

Q. No, the previous cut of cars?

A. Foreman Sheppard.

Q. Foreman Sheppard. And you gave them in the same manner and on the same type of a slip as you gave that order? A. No.

Q. You didn't? A. No.

Q. How did you give that order?

A. I mentioned before that it so happened that the record of cars that he was to pull and bring down to me was made out by a clerk. Foreman Sheppard came in and asked me where I wanted these cars. I stepped outside with him and said, "13 is clear, put them in there."

Q. Well, whether you made out the record or a clerk made out the record, a record was made out?

A. Yes.

Q. You don't know where it is?

A. No, I don't.

Q. Just one more question: You said, talking about the blue flag used during the daytime, that that is used not on the dock, or should not be used under the blue light rule on the dock, but should be used on the end [951] of any cars on Track 13?

A. That's right.

Q. Does not the blue light rule apply exactly the same insofar as lights are concerned and blue flags are concerned?

Mr. McKevitt: Are you speaking of all classes

(Testimony of James Crump.)

of people on the premises or the Addison Miller?

Mr. MacGillivray: He can answer the question without any help, Mr. McKevitt.

Mr. McKevitt: Well——

A. State your question again.

Q. (By Mr. MacGillivray): Does not the blue light rule apply the same to blue lights and to blue flags?

A. The blue light would be covering the area that the men would be working, yes.

Q. Well, aren't both supposed to be on the ends of cars spotted on any particular track?

A. Spotted on the tracks, yes, for service.

Q. And the blue signals under the blue light rule, whether light or flag, are to be placed by the trainmen, are they not?

A. By the man in charge of the servicing.

Q. Yes.

Mr. MacGillivray: That is all.——

Q. In other words, Mr. Crump, the blue light rule reads as [952] follows, does it not——

Mr. Cashatt: I object to this, your Honor, I don't think it is proper recross.

Mr. MacGillivray: I think it is.

The Court: Well, do you want to put the blue light rule in evidence?

Mr. MacGillivray: I just want to ask him if it does not provide as follows:

The Court: Well, all right, overruled.

Q. (By Mr. MacGillivray): Does not the blue light rule apply as follows:

(Testimony of James Crump.)

"Rule 26. A blue signal displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it. When thus protected, it must not be coupled to or moved. Each class of workmen will display the blue signals and the same workmen are alone authorized to remove them. Other equipment must not be placed on the same tracks so as to intercept the view of the blue signals without first notifying the workmen."

Isn't that the blue light rule?

A. That is the blue light rule.

Q. So whether it is blue lights or blue flags, they are [953] exposed on the ends of the cars and not on the dock, isn't that correct?

A. Well, according to that rule, yes.

Mr. MacGillivray: That is all.

Redirect Examination

Q. (By Mr. Cashatt): Mr. Crump, the practice that we have been talking about here for three or four days, we haven't been talking about the blue flag rule or blue light rule. What was the established practice between Addison Miller and the Northern Pacific Railroad for the placement of blue lights on Track 13 and Track 12?

A. Well, it was understood and agreed that prior to the time there was to be any servicing done on refrigerator cars or salt cars on those tracks, that a blue light would be turned on on each end of the dock, which would naturally govern and protect all cars within those boundaries, and that we would

(Testimony of James Crump.)

refrain from using that track or coupling into the cars while those blue lights were on.

Q. Who was to turn the blue lights on?

A. Well, Addison Miller employees, when they were getting ready to go to work on whatever they were going to do.

Q. And that was their responsibility? [954]

A. Oh, yes, strictly.

Q. Mr. Crump, in regard again to Exhibit 25 and the other list that counsel asked you about with regard to the cut of 9 stock cars, do you know if there is any record or any copies of that record of those 9 stock cars that was given to that switchman?

A. I would say there is records, yes.

Q. But do you know where we can locate such a record?

A. Well, I would suppose that you could get the record from the car clerk at Yardley—it takes care of stock cars being moved—Harold Lind.

Mr. Cashatt: That is all.

Recross Examination

Q. (By Mr. MacGillivray): There is just one question, Mr. Crump: In your 15 years of experience out there at the Yardley yards, have you not been instructed that regardless of the blue light rule, when there is any likelihood that men are working on or about cars, you should not depend upon your blue light rule?

A. They are not to work about cars without protection of that blue light.

(Testimony of James Crump.)

Mr. MacGillivray: Would you read the question back, please? [955]

(The question was read.)

A. I guess I have been instructed to that effect, yes.

Mr. MacGillivray: That is all.

A. Give them protection.

The Court: Any other questions of this witness?

Mr. MacGillivray: No, your Honor.

Mr. Cashatt: That is all.

The Court: All right.

(Witness excused.)

Mr. Cashatt: I may want to call another witness, your Honor.

Mr. Corrigan.

FRANCIS T. CORRIGAN

having previously been duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Cashatt): Mr. Corrigan, you have been in court during the discussion of switch list No. 25, and have you heard the other discussion concerning the list that was given for the movement of the 9 stock cars? A. Yes, I have.

Q. Does the Northern Pacific Railroad have any copy of that list that covered the movement of those 9 stock [956] cars?

A. Not at this date, I don't think. That man

(Testimony of Francis T. Corrigan.)

was given a list something similar to this. Probably when he got through with it, he threw it away.

Q. And you have looked and found——

A. I looked for it, yes, I looked for it definitely, and I couldn't find any copy of it at all.

Mr. Cashatt: That is all.

Cross Examination

Q. (By Mr. Etter): You didn't throw that list away, though, did you?

A. I didn't have anything to do with it, I wasn't even here.

Mr. Cashatt: Mr. Prophet brought that in.

Q. (By Mr. Etter): At least, it apparently wasn't thrown away or——

A. I don't know anything about that.

Mr. McKevitt: Object to that, your Honor.

The Court: Sustain the objection.

The Witness: I am all thorugh?

The Court: I don't know. Wait.

Mr. Etter: That is all.

The Court: That is all, then, I guess. It appears to be. [957]

(Witness excused.)

Mr. Cashatt: Defendant rests.

The Court: All right, I will ask the jury to step out. Let's see, wait a minute.

Mr. MacGillivray: Could we take five minutes?

The Court: Yes, all right. We will take a five minute recess and please let me know if you have any rebuttal, because I am sure that at least for

the record the defendant will wish to renew the motion for directed verdict and that should be made, I presume, at the conclusion of the rebuttal.

Mr. Etter: Rebuttal will be very brief, your Honor.

Mr. MacGillivray: There will be some.

The Court: All right.

(Defendant Rests.)

(A short recess was taken.) [958]

The Court: All right, proceed.

Mr. Etter: Call Mr. Kallas, please.

Rebuttal.

GEORGE KALLAS

called and sworn as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Etter): Your name is George Kallas? A. Right.

Q. Mr. Kallas, you will have to speak out in this courtroom, the acoustics are a little difficult, so all of these jurors can hear what you have to say, and also the other people in the court.

Where do you live, Mr. Kallas?

A. I live at 8608 East Bridgeport.

Q. And what is your present occupation?

A. A detective in the Sheriff's office.

Q. You are a detective in the Sheriff's office of Spokane County, is that correct? A. Yes.

(Testimony of George Kallas.)

Q. How long have you been with the Sheriff's office of Spokane County, Mr. Kallas? [961]

A. It will be four years in October.

Q. Four years in October, and I think you said you were in the detective division? A. Right.

Q. Did you receive a call concerning an accident that occurred at Yardley on July 17th of 1952?

A. Yes, I did.

Q. Do you recall when it was that the Sheriff's office received that call?

A. Well, the call came into the office at 8:20, according to the report.

Q. According to the report? A. Yes.

Q. And did you proceed on an investigation?

A. No, it was about 20 minutes later that I was notified that I was wanted over there.

Q. That you were wanted over there. What did you do, sir?

A. I went over to the Addison Miller Company located over there, and at this time there was nobody around other than part of the workmen were there.

Q. All right, did you have occasion at that time to talk with any representative or agent of the Northern Pacific Railroad?

A. Yes, after I arrived there, I first contacted two gentlemen who were there, I believe the name was [962] Vallarano and Mr. Johnson.

Mr. McKevitt: Object to that. He says Northern Pacific Railway Company employees; those are not Northern Pacific employees.

(Testimony of George Kallas.)

Q. (By Mr. Etter): You met two men?

A. I met two men.

Q. All right.

A. And I was taken, showed which train that the accident happened on, and while I was examining between the cars, Mr. Harrison of the special agent's office contacted me there.

Q. Special agent's office of who?

A. The railroad.

Q. Northern Pacific Railroad? A. Yes.

Q. All right, did you make a physical investigation of the area where the accident had occurred?

A. Yes.

Q. And will you state what you found?

Mr. McKevitt: That is objected to, at least in the form of it, because it can't be determined at this time, if the Court please, whether it is rebuttal testimony or not. The way the question is framed now it could be very well considered part of their case in chief.

The Court: Will you limit that somewhat? [963]

Mr. Etter: I have got to lay a foundation, I think, in order to employ the rebuttal testimony here, your Honor. It is as to the car that was involved.

The Court: Well, you asked him what he found in his investigation in and around the track at the scene of the accident; is that what you had in mind?

Mr. Etter: That is correct.

The Court: All right, go ahead.

(Testimony of George Kallas.)

Q. (By Mr. Etter): What did you find in your investigation around, in and about the particular scene of the accident?

A. By being directed to the train, I started checking from where this happened, and by following up the blood stains on the wheels of the car I found between which cars this was supposed to have taken place.

Q. And how did you determine that? How did you find out between which two cars?

Mr. Cashatt: Object to this——

Q. (By Mr. Etter): What did you find?

Mr. Cashatt: ——your honor, as to what he concluded. No objection to what he saw.

Q. (By Mr. Etter): All right, what did you see?

Mr. Cashatt: He wasn't there.

Q. (By Mr. Etter): What did you see?

A. I found streaks of blood on the wheels—well, it [964] would be what I would call the front wheels, it would be the east wheels of the car involved in this.

Q. Did you find any blood——

Mr. Cashatt: I object to the car involved in this. He wasn't there, your Honor.

The Court: Well, on a certain car, we'll say.

Q. (By Mr. Etter): You found blood stains or streaks of blood on the wheels of a certain car?

A. Right.

Q. Is that right. Did you find blood stains or blood on the wheels or trucks of any other car?

(Testimony of George Kallas.)

A. No, I didn't.

Q. You did not?

A. Other than—I will take that back—other than where cars had rolled along the track, just on the bottom part of the wheels.

Q. On the bottom part?

A. The bottom part of the wheels.

Q. And on this particular car that you refer to, you found the blood and the blood stains was not only on the bottom of the wheel, but on other parts of the trucks? A. Right.

Q. Where was it on the other parts of the trucks?

A. It was on the outside, it would be the north side of the wheels. [965]

Q. The north side of the wheels?

A. Right.

Q. And this car that you speak of, was that the only car where you found that condition?

A. Yes.

Q. And do you know what the number of that car was?

A. I have the numbers of both cars involved.

Mr. Cashatt: Your Honor——

The Court: Counsel objects to your saying "involved."

Q. (By Mr. Etter): Have you the number of the car upon which you found the blood stains on the flat part of the wheel and on the outside, as you have described in your testimony?

A. I have the number, yes.

(Testimony of George Kallas.)

Q. Will you tell us what number that was?

A. I can't tell you which number it was, I can give you the numbers of that car and the car ahead of it. I didn't——

Q. Beg your pardon?

A. I can give you the numbers of the car ahead and the car that had the—they were coupled together.

Q. All right, what are the numbers of those two cars? A. May I read them?

Q. You may refresh your recollection. [966]

The Court: That is a memorandum you made yourself? A. This is a record I made.

Q. (By Mr. Etter): To refresh your recollection, just find the numbers of those two?

A. The two numbers involved here was "Pa. 77346" and the other one was "Q 56160."

Q. Of those two cars, that is, referring to 77346 and 56160, upon which of those cars or the trucks of which of those cars or wheels did you find the blood stains which you have described?

A. I can't be sure on that.

Q. You can't be sure?

A. I can't be sure.

Q. Will you tell me whether or not those two cars were coupled together, however?

A. They were coupled.

Q. At the time of your investigation?

A. They were coupled.

Mr. Etter: That is all. Just a minute.

Mr. MacGillivray: Is 50 in evidence?

(Testimony of George Kallas.)

The Clerk: 50 is. I haven't got it marked.

The Court: It is exhibit number——?

The Clerk: 50, your Honor.

Mr. Etter: It hasn't been marked, but I understand it has been admitted as an exhibit. [967]

The Court: 50 has been admitted?

Mr. Etter: Yes, your Honor.

The Court: All right.

Q. (By Mr. Etter): I am handing you Plaintiff's Exhibit 50 and ask you to examine that picture and the cars which appear there. Can you tell me whether or not you remember seeing any of those cars before this, let's put it that way?

Mr. Cashatt: What was that question again?

Q. (By Mr. Etter): Well, do you recall seeing the car there that you found that night, either of the cars?

A. Well, the car with the number here would jibe with my report.

Q. And what number is that? A. 77346.

Q. And is that the report that you have?

A. That is the report that I filed in the office.

Q. And that was the car that was coupled on the one when you got there? A. Yes.

Q. You don't recall which of those two cars you found the blood stains on this wheel on the north side and also on the flat side of the truck?

A. Right.

Mr. Etter: That is all. [968]

(Testimony of George Kallas.)

Cross Examination

Q. (By Mr. Cashatt): Mr. Kallas, how many cars did you look at out there that night?

A. I went up to—I would have to make a guess, I believe that it was approximately 9 that I checked. No, I will take that back, I looked from where this took place up to one of these two numbers, between those, and then two cars ahead of that, would probably be about five cars, I imagine.

Q. Did you check out there to see 9 stock cars in that string of cars? Did you make any note of that?

A. There was cars in that string, but I couldn't definitely tell you what it was.

Q. Well, did you make any note of how many stock cars you saw in that string?

A. No, I didn't.

Q. Did you look under any of those stock cars, on any of the under-running carriage, to see if there was any blood on any of those?

A. No, I only, as I said before, I checked from the place that this took place and east, and just from there east to where the cars were stopped.

Mr. Cashatt: That is all.

The Court: Is that all? [969]

Mr. Etter: That is all.

(Witness excused.)

Mr. Day.

JOHN T. DAY

called and sworn as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination

Q. (By Mr. Etter): State your name, sir.

A. John T. Day.

Q. Where do you reside at the present, Mr. Day? A. Richland, Washington.

Q. How long have you resided in Richland, Washington?

A. Approximately 19 months.

Q. What is your occupation?

A. I am an attorney.

Q. And are you employed by somebody particularly?

A. Yes, I am employed by one of the contractors, Kaiser Engineers, at Richland, Washington, as a resident attorney.

Q. Mr. Day, did you make an investigation of the accident which involved Gerry Stintzi some time on or about the first week or so in August of 1952?

A. I did. [970]

Q. And at that time, did you have a conversation with a man by the name of Fincher who was the foreman at the Addison Miller icing dock?

A. I had two conversations, one short, one rather lengthy.

Q. And when was it that you had the lengthy conversation with him, if you recall?

A. It was approximately August the 9th, 10th or 11th, around that time.

(Testimony of John T. Day.)

Q. Of the year 1952? A. 1952, yes.

Q. Who was present at that discussion?

A. The last discussion, Mr. Fincher and myself, and during the discussion a couple of workers walked up. They didn't take in the entire discussion, but they——

Q. And would that be the discussion that I inquired of Mr. Fincher about and he testified here?

A. That was the discussion.

Q. I will ask you whether or not at that time Mr. Fincher stated to you, in substance and effect, that he was not expecting a switch and that he did not think the blue lights were good enough to be seen, anyway?

A. In form and substance, yes. More particularly, however, he said he was not expecting a floating switch of that nature.

Q. That was the statement that he made to you?

A. That's right.

Mr. Etter: That is all, sir.

Cross Examination

Q. (By Mr. McKevitt): Mr. Day, this accident happened on the 17th of July, 1952, did it not?

A. That's right.

Q. And at that time you were practicing law in Spokane? A. That's right.

Q. With what firm?

A. The firm of Keither, Winston, MacGillivray and Repsold.

(Testimony of John T. Day.)

Q. Mr. Etter wasn't in the lawsuit when the first complaint was filed, was he?

Mr. Etter: Is there something objectionable about that, Mr. McKevitt?

Mr. McKevitt: No, I think you have added to the dignity of it.

Mr. Etter: I appreciate that statement.

Mr. McKevitt: Are you objecting, is the gentleman objecting, your Honor?

The Court: I think not. Go ahead.

Mr. Etter: No, that is complimentary.

A. No, Mr. Etter was not in the lawsuit at that time.

Q. (By Mr. McKevitt): When did you first become connected [972] with the lawsuit? What I am getting at is this: Were you the original attorney for Mrs. Stintzi and Gerald, or what?

A. I was one of the original attorneys, yes.

Q. Mr. MacGillivray didn't go out there with you on either one of these occasions?

A. Not on that occasion, no.

Q. Well, you said you were out on two occasions, you talked to Fincher on two occasions, did you?

A. That's right.

Q. On different dates? A. That's right.

Q. What was the first date you talked to him?

A. The day before this particular occasion we are discussing.

Q. And you had been employed or the firm had been employed to represent the Stintzis at that time? A. That is correct.

(Testimony of John T. Day.)

Q. In an action against whom?

A. The action against the Northern Pacific Railroad.

Q. Not against Addison Miller?

A. Well, now, when you speak of employment, Mr. McKevitt, I'm afraid I don't understand the question.

Q. Well, I am not speaking——

A. Are you asking me what my relationship with my client [973] was?

Q. That isn't my question. Investigating this matter for the purpose of instituting an action, I asked you against whom, you said the N. P., is that correct?

A. Yes, investigating the facts surrounding the action, which had already been filed at that time.

Q. For the purpose of placing legal responsibility on somebody, is that true?

A. No, that is not true.

Q. It is not true?

A. No, not placing legal responsibility.

The Court: I'm not sure that the witness understands your question, Mr. McKevitt. Are you asking if the purpose of the action was to place the responsibility or the purpose of his visit?

Mr. McKevitt: The purpose of the action that was to be instituted, yes, your Honor.

Mr. Etter: He stated it already had been instituted.

The Court: I assume that it usually the purpose.

Mr. Etter: Yes.

(Testimony of John T. Day.)

The Court: Go ahead.

Mr. McKevitt: Thank you.

Q. Mr. Day, what was the question that you put to Mr. Fincher in connection with this happening that elicited this answer? What did you ask him?

A. I asked him for his version of how this accident happened.

Q. Is that the way you put it?

A. That is one of the questions I asked him.

Q. And what did he say, what version did he give you?

A. He said, "I am not going to make any statement for you because I have already been instructed not to."

Q. By whom?

A. By the Northern Pacific claims agent.

Q. Well, then, did you pursue the discussion further? A. I certainly did.

Q. Didn't he tell you that he had given a statement to Mr. Thomsen? A. That's right.

Q. If you wanted to find out anything about it, you could go down and take a look at that statement? A. That was part of it, yes.

Q. Yes, he told you you should go and look at the statement, didn't he?

A. No, not that I could look at the statement; that if I wanted any information, I would have to go down and get it from Mr. Thomsen.

Q. Well, you knew that you were entitled to look at that statement, at least, under the rules of this

(Testimony of John T. Day.)

Court and Rules of Procedure; you knew that, didn't you? [975] A. Certainly.

Q. Yes. And all statements that we took have been furnished to you people, have they not?

Mr. Etter: I don't know that this is part of the cross examination, your Honor. It is interesting, but I don't know what it has to do with my direct examination.

The Court: Well, I think it does go beyond the scope of the direct somewhat.

Mr. McKevitt: I didn't know there was an objection on that ground.

Mr. Etter: You can proceed.

Mr. McKevitt: All right.

A. Do you want the answer, Mr. McKevitt?

Mr. Etter: Yes.

A. We have received what statements you took or the ones that we demanded under the procedure, yes. Didn't have them at that time.

Q. (By Mr. McKevitt): And including Mr. Fincher's? A. Yes, we certainly have.

Q. You have read Mr. Fincher's statement?

A. Yes, I have.

Q. Is there anything in that statement, as you recall, with reference to the fact that these blue lights weren't any good or couldn't be seen?

A. No, there isn't. [976]

Q. No. Did you ask him anything about blue lights?

A. I followed up with some questions when he brought up blue lights, yes.

(Testimony of John T. Day.)

Q. My question was, then you say he followed up with blue lights?

A. I followed up with some questions after he broached the subject of blue lights.

Q. What did you ask him about the blue lights?

A. I asked him if, as he stated, the blue lights weren't on, why they weren't on.

Q. Uh-huh. But before you went out there, you knew, did you not, that it was the practice of Addison Miller on occasions, at least, when icing cars, to have the blue light on that dock? You knew that when you went out there, didn't you?

A. I didn't, I went out there to find out what the practice was.

Q. What the practice was? A. Yes.

Q. Didn't you ask him, "Wasn't there a blue light on this dock?" or "Was there a blue light on this dock?"

A. No, I didn't ask him that, he brought it up. He answered that or interjected that gratuitiously.

Q. He just volunteered the fact that there was no blue light on the dock and, if there had been one, it [977] wouldn't have been any good, or something like that; is that true?

A. Well, not in the way you put it. I'll tell you what he did say, if you like.

Q. Well, tell me what he said.

A. He said, "I feel very sorry for the kid. You know what my situation is, however. But I don't think it was my fault, except that I didn't put up the blue lights. But it wouldn't have made any dif-

(Testimony of John T. Day.)

ference, anyway, because with these lights on at that particular time of the day, the lights are so poor, the blue lights are of such poor quality, that I don't think they can be seen, anyway, and I don't usually put them on at that time."

Q. The reason, then, he gave for not putting them up, he didn't think at that time of day they could be seen, is that right?

A. Under those conditions, that's right.

Q. Meaning the weather conditions?

A. No.

Q. Did you ask him anything on that particular date about cleaning out the slush pit?

A. Yes, I think I did. I think I asked him about everything we had knowledge of or felt would be an issue in the case. [978]

Q. Who had you talked with, if anyone, about this accident before you talked to Fincher?

Mr. Etter: That is improper cross examination, who he had talked to before he talked to Mr. Fincher?

Q. (By Mr. McKevitt): That purported to know anything about how this accident happened?

Mr. Etter: I still object to that. I don't think it is harmful, but we can be here, as your Honor says, for a week.

Mr. McKevitt: I object to counsel's statement.

Mr. Etter: This has to do with conversation with Mr. Fincher.

The Court: We will see how far it goes. Overruled.

(Testimony of John T. Day.)

Mr. Etter: All right.

A. Would you read the question again?

(The question was read.)

Q. (By Mr. McKevitt): Who purported to know anything about it?

A. That purported to know anything about it? I talked to Gerald Stintzi, I talked to Mrs. Stintzi, I talked to the nurses.

Q. Well, I mean how the accident happened now, that actually knew how it happened or purported to know how it happened?

A. All of these people claimed they knew how it happened. [979] Do you mean eye witnesses?

Q. Yes, or employees of Addison Miller, put it that way?

A. I talked to a couple of workmen around there who were on the shift at the time. They supposedly knew something about it, having been at the accident scene afterwards. I talked to——

Q. Give us the names.

A. I talked to Gerald Stintzi and that was——

Q. Let's put it this way, did you go out there with a man by the name of Johnson?

A. On that occasion or prior occasion?

Q. On any occasion?

A. Yes, I went out there with a man by the name of Johnson.

Q. What date was that?

A. I believe one day prior to this conversation we are talking about.

(Testimony of John T. Day.)

Q. The first time you went out, you went out with Johnson, is that correct?

A. Johnson and others.

Q. Well, who was Mr. Johnson?

A. Mr. Johnson was a workman, or claimed to be a workman, on that crew at that time.

Q. And you knew Mr. Johnson before you went out there, didn't you? [980]

A. I had met Mr. Johnson, yes.

Q. What?

A. Yes, I went out with him.

Q. You had found out that he was working there for Addison Miller at the time Gerald was hurt, didn't you? A. That's right.

Q. And you interviewed him before you went out to talk to Fincher, didn't you?

A. That's right.

Q. And you asked him about the blue lights, too, didn't you?

A. No, I don't believe I asked him about the blue lights.

Q. Did he tell you anything about the blue lights? A. He probably did.

Q. Yes.

A. I didn't question Mr. Johnson, if that is what you mean.

Q. Well, you said he probably told you; as a matter of fact, he told you the blue lights were not on, didn't he? Johnson told you that?

A. He probably did, because I know I knew it at

(Testimony of John T. Day.)

that time, or I knew that there was a question at that time.

Q. You felt that there was a question at that time as to whether they were or were not on, isn't that true?

A. That's right, it was one of the issues. [981]

Q. And that was one of the questions that you wanted to have answered, wasn't it?

A. Well, I would suppose so, Mr. McKevitt.

Q. Was Mr. Johnson working for Addison Miller at the time you went out there with him?

A. I don't believe——

Q. August 10th or 11th of '52?

A. No, I don't believe so, Mr. McKevitt.

Q. When did you first meet him?

A. On the occasion of the first visit out at Addison Miller by me.

Q. Oh, he just came up and introduced himself or joined in the conversation?

A. No, he went out there with us.

Q. Oh, I see. That is what I am trying to get at.

A. Fine.

Q. Then, he had been in your office, or the office of the firm you were with, before you went out there and after the lawsuit was started?

A. I don't know, Mr. McKevitt. I presume that he had been to our office that morning to go out with us.

Q. And where is Mr. Johnson now?

A. I have no idea.

(Testimony of John T. Day.)

Q. Has he been in this courtroom since the trial started? A. He has. [982]

Q. Where did he come from?

A. Seattle, Yakima, one of those two places, I don't know.

Q. He was asked by the attorneys representing the plaintiff to come over from the Coast to appear as a witness, wasn't he? You know that?

A. I believe that he was.

Q. You what?

A. I believe that he was. I don't know, I didn't make out the list of witnesses and I didn't participate in that part of it. I would assume that he was.

Q. And he was instructed by some one of the attorneys for the defense to return to Seattle, wasn't he? A. He was not.

Q. Or for the plaintiff?

A. I don't know, I don't believe he was. He certainly wasn't instructed by me to that effect.

Q. Mr. Day, you have been sitting here in the courtroom during the whole course of the trial, haven't you? A. That's right.

Q. And you were present when the deposition of Gerald was taken, weren't you? A. No.

Q. Well, you were when Mr. Prophet's deposition was taken in my office?

A. Yes, I was. [983]

Q. You came up from Richland for that purpose, didn't you? A. Yes.

(Testimony of John T. Day.)

Q. You, as an attorney, still have an interest in this lawsuit, don't you? A. That's right.

Q. Yes. Now did you ask Mr. Fincher that night anything about the number or type of cars that were on that track?

A. No, I don't believe I did, Mr. McKevitt.

Q. Did you know when you went out there that Gerald got hurt as the result of passing an ice bucket underneath couplers of coupled cars? You knew that?

A. Yes, while doing that, yes.

Q. Did you ask Mr. Fincher how many cars were east of the string?

A. I don't believe that I did, Mr. McKevitt, except in the general request for information about the accident.

Q. Did you ask him how many cars were east or west of the point of accident?

A. The answer is the same, I don't believe that I did specifically.

Q. Did you ask him whether or not he had instructed Gerald and Allan Maine to crawl under cars and dump this slush north of 13?

A. I believe that I did. [984]

Q. And he told you that he had seen them doing it and told them to quit doing it, didn't he?

A. He did not. My recollection is that is one of the things he refused to comment on.

Q. He wouldn't say yes or no as to whether he instructed them or not to carry that work out in that fashion?

(Testimony of John T. Day.)

A. As I say, it is my recollection that that is one of the questions he referred me back to the railroad on.

Q. Well, then, I take it from that that you did ask him whether he gave Gerald instructions to dump this ice in the manner in which he was dumping it? You did ask him that?

A. I may have, I believe that I did, that is probably one of the questions that I asked him.

Q. And after you gathered the information that you did on these two investigations, you instituted an action? No, that was pending before. Prior to that visit out there and 12 days after the accident, you instituted an action, did you not?

The Court: That is repetition. He said he instituted an action before he went out.

Mr. McKevitt: As to the time element, your Honor, I don't think that was——

The Court: Why is that material?

Mr. McKevitt: Very well. [985]

The Court: Proceed with the cross examination.

Mr. McKevitt: That is all.

Mr. Etter: That is all, Mr. Day.

(Witness excused.)

Allan Maine, will you come forward, please? You have been sworn, you can take the stand.

ALLAN MAINE

having previously been sworn, resumed the stand in rebuttal, and testified further as follows:

Direct Examination

Q. (By Mr. Etter): You have testified heretofore in this case, Allan? A. Yes.

Q. Now you keep your voice up, it is important that we hear you. Have you been here during the testimony of Mr. Fincher? A. Yes.

Q. And were seated in the courtroom, were you?

A. Yes.

Q. Now, Allan, I will ask you this: Did you hear his statement that he gave you and Gerald instructions to dump the ice north of Track 13 somewhere down near the slush pit? He gave you the instructions down by the slush pit? [986]

A. No.

Q. No, but you heard him say that?

A. Oh, yes.

Q. Yes. Is that or is that not the fact?

A. That isn't the fact.

Q. And you heard him say that at that time there were about 15 fellows around; is that the fact or not the fact? A. That is a fact.

Q. No, but I mean around the slush pit when he gave the instructions? A. No.

Q. Beg your pardon?

A. There was no one there.

Q. All right, where were the instructions given to you, Allan? A. At the top——

(Testimony of Allan Maine.)

Mr. McKevitt: He has already testified they were given up on top of the dock.

Mr. Etter: All right.

The Court: Go ahead.

Q. (By Mr. Etter): Where were you when you received your instructions?

A. On top of the dock.

Q. Now I will ask you whether or not, when you and Gerald [987] came back across Track 13 with an empty bucket, at any time after you received your instructions, did you see Mr. Fincher?

A. I did not see Mr. Fincher at any time, no.

Q. Did you and Gerry at any time have any conversation with Mr. Fincher after he gave you your directions as to what you ought to do?

A. None.

Q. Did Mr. Fincher at any time stand in the doorway and warn you boys about going across Track 14 between the cars? A. He did not.

Q. 13, beg your pardon? A. No.

Q. He did not? A. He did not.

Q. And when was the first time that you saw Mr. Fincher after he gave you and Gerry your instructions on dumping the slush?

A. After the accident when I went up on top of the dock.

Q. And where was he at that time?

A. I believe——

Q. Mr. Fincher?

A. He was on top of the dock.

Q. He was on top of the dock? [988]

(Testimony of Allan Maine.)

A. Yes.

Mr. Etter: That is all.

Cross Examination

Q. (By Mr. McKevitt): You mean that after you went up on top of the dock and after the accident, Allan, if I understood you correctly, not to do that again, something like that?

A. Beg pardon?

Q. Did he give you some instructions—maybe I wasn't paying close enough attention—after the accident and after you went up on the dock, did you have some conversation with him then?

A. After the accident?

Q. Yes? A. I did.

Q. Well, what was that conversation about?

A. It was after the accident and I told him that I was through, I wasn't going to work a minute longer. Right there I quit.

Q. Well, did you tell him at that time, explain to him that you had been crawling under these couplings? A. I did not.

Q. You didn't tell him that?

A. No. [989]

Q. Did you tell him that at any time?

A. No.

Q. At the time he gave you these instructions, he did not tell you to crawl under those couplers, either, did he? A. No.

Mr. McKevitt: That is all.

(Testimony of Allan Maine.)

Mr. Etter: That is all, then.

(Witness excused.)

Gerry.

GERALD STINTZI

having been previously sworn, resumed the stand in rebuttal, testified further as follows:

Direct Examination

Q. (By Mr. Etter): Gerald, you have been seated here in the courtroom during the testimony of Mr. Fincher, is that correct? A. I have.

Q. Do you remember Mr. Fincher?

A. Yes, I do.

Q. Have you seen him since the accident, Gerry?

A. No, I haven't, just in the courtroom.

Q. Until he came into court, is that correct?

A. That is correct.

Q. Gerry, were you and Allan Maine standing anywhere near [990] the so-called slush pit when Mr. Fincher gave you instructions to take the slush ice out and dump it north of Track 13?

A. We were all standing around where the salt comes up, that salt gig.

Q. The salt gig? A. That is correct.

Q. Is that the salt gig that appears in the exhibit numbered 9, Gerry?

A. That is correct.

Q. And you say there were a group of you around there at the time?

A. Yes, we were all scattered around.

(Testimony of Gerald Stintzi.)

Q. Is that where you received your instructions on the cleaning out of the slush pit?

A. That is correct.

Q. And that was when he instructed you and Vallarano and this Canadian and Allan Maine to perform that? A. That is correct.

Mr. McKevitt: I object, this is not proper rebuttal, your Honor.

The Court: I think it is repetition. Confine the examination to matters of which Mr. Fincher testified.

Q. (By Mr. Etter): Were 15 men along with you or Mr. Vallarano or Allan Maine gathered around the slush pit [991] when you received those instructions? A. We were not.

Q. Now after you received the instructions about taking the slush ice out of the pit and dumping it north of the tracks, Gerry, did you see Mr. Fincher again that evening? A. I did not.

Q. And you heard his testimony here that he was in the doorway and talked to you and Allan when you came back, or at least he saw you come out from behind a car with a bucket; you heard that testimony? A. I did.

Q. Did you see him at that time?

A. I did not.

Q. Did he make any statement to you at that time as he testified here?

A. He didn't say a word.

Q. Did he say anything to you or did you talk

(Testimony of Gerald Stintzi.)

with him at any time from the time you received your instructions until after this accident?

A. I couldn't even talk to him when I couldn't even see him.

Q. You didn't see him, is that it?

A. No, I didn't.

Q. And he did not give you any such instructions? [992] A. No, he didn't.

Q. I will ask you this, Gerry: At any time that you were taking the bucket and dumping the ice, at any time did you and Allan both go under the coupler or between the cars together?

A. No, it would be half impossible to get two guys——

Q. No, but did you do it? A. No.

Q. Is it a fact that on all occasions either one or the other was on one side or the other of the coupler? A. That is the way we worked it.

Q. That is the way you worked it?

A. Yes.

Mr. Etter: That is all.

Cross Examination

Q. (By Mr. McKevitt): But one or the other of you to get to the north side of the track and from there back would have to crawl under the couplers and under those hoses that were disconnected there, isn't that true? A. Just one of us.

Q. Just one? A. That is correct.

Q. But at the time you were coming from the north to the [993] south, you were in the process

(Testimony of Gerald Stintzi.)

of crawling under one of those couplers, weren't you? A. Could you repeat that again?

Q. Pardon me. At the time you had your accident, were you not in the process of crawling under the couplers to go back and get another bucket of ice?

A. I was just handing him the bucket when my leg was across for support, that is when the wheel hit the back of my leg.

Q. You were in between the rails, I mean by that?

A. My legs were straddled across the rails.

Q. One leg to the north and one leg to the south? A. That is correct.

Q. And were you handing the bucket under or over the coupler? A. Under.

Q. Under the coupler? A. Yes.

Q. Then after you handed the bucket to Allan, then you crawled under the coupler or started to crawl under the coupler before you were hurt?

A. No, I was hit, I was hit and I had my hand —I can't recall exactly, but I had my hand somewhere near the bucket, and bam and that was it.

The Court: I think what Mr. McKevitt was inquiring, that was on the prior trips before you got hurt, isn't that right?

Mr. McKevitt: Yes, your Honor.

A. Oh, yes, before the accident, I would just bend over and go right underneath.

Q. Just before the accident? A. Yes.

Q. After you had handed the bucket to Allan?

(Testimony of Gerald Stintzi.)

A. He would take the bucket and then I would go under.

Q. You were in the process of bending over to crawl under the coupler, one leg in between the rails and the other leg out, when you were hurt, weren't you? In this fashion (indicating), getting down low?

A. You mean before I was hurt?

Q. No, just after you had handed the bucket back to Allan and before you were struck, what was your position?

A. At the time when I was struck, my position, if you spread your legs and bend over a little bit and—no, not that far, up a little higher. The coupling was over to your right just a little bit, over to your right. Put your hand back. All right, down there, it would be about the ground right there, and the bucket was on the ground like that, and it hit me from behind and hit my right leg.

Q. Just before that, your intention was to crawl under the [995] coupler?

A. No, I handed him the bucket. I can't get through there with a bucket.

Mr. McKevitt: I see. That is all.

Mr. Etter: That is all.

(Witness excused.)

Mr. MacGillivray: Your Honor, one thing we overlooked in our case in chief, and that is a stipulation that counsel entered into that the life expectancy of Gerald Stintzi on July 17, 1952 was 44.27 years.

The Court: I think the Court takes judicial notice of life expectancy. The table has been recognized by the Supreme Court of the State of Washington. If you want me to take the time to look it up, I can do it.

Mr. Etter: We know what it is.

Mr. McKevitt: That isn't the point.

Mr. MacGillivray: Mr. Cashatt, are we stipulating that his expectancy was 44.27 years?

Mr. Cashatt: That is correct.

Mr. Etter: That is all.

Mr. MacGillivray: Plaintiff rests.

(Plaintiff Rests.)

The Court: Any other testimony? [996]

Mr. McKevitt: No surrebuttal.

The Court: I will excuse the jury, then, for a recess.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: You wish to renew your motion, I assume, don't you?

Mr. McKevitt: The plaintiff having rested and all of the evidence being in, the defendant now renews the motion for directed verdict made at the close of the plaintiff's case, and moves the Court to direct a verdict in favor of the defendant for the reasons and upon the following grounds, to-wit:

(1) That there has been no evidence introduced in this case showing any actionable negligence upon the part of the defendant railway company or its

employees which was a proximate cause of the accident;

(2) That the evidence conclusively discloses that at the time and place in question, he was not in the position that he was in with the knowledge, consent or permission of the defendant railway company and, consequently, his status was that of a trespasser to whom we owe no duty except to refrain from wilful or wanton injury, which could have no application because no showing was made that we had [997] any knowledge of his being in a position of danger at the time these cars were drifted into the siding; and

(3) That in any event, the plaintiff himself is guilty of contributory negligence as a matter of law.

I won't pursue the argument further. I assume your Honor——

The Court: Well, the motions will be denied, with the privilege, of course, of renewing them if it becomes necessary——

Mr. McKevitt: Yes.

The Court: ——ten days after the verdict.

Mr. McKevitt: Now I believe that at this time I am permitted, if your Honor pleases, to make a motion to the Court for the purpose of requesting the Court to withdraw certain allegations of the amended complaint and the statement of issues.

The Court: Yes, I had in mind taking that up with you if you didn't make the motion. I have to instruct the jury on what the plaintiff's contentions are, and I think even though no motion were made, I would probably be responsible if I put something

in that hadn't been sustained by substantial evidence.

I think they are contained in the plaintiff's statement of contentions, substantially, I think, identically, as they were in the amended complaint, aren't they? [998]

Mr. MacGillivray: Yes.

Mr. Etter: Almost identically.

The Court: Paragraph VII, Page 3.

Mr. McKevitt: Then with the understanding that it is the position of plaintiff's counsel that the statement of the issues is as broad as all of the charging allegations of the amended complaint, I take it it will not be necessary to address my motion to the amended complaint separately from the statement; is that correct?

The Court: It may be understood that your motion goes to both, if you like.

Mr. McKevitt: Very well.

The Court: You are asking to withdraw those contentions.

Mr. McKevitt: I make the general motion that the Court withdraw from the consideration of the jury any allegation in the amended complaint or in the statement of the issues to the effect that at the time that this boy was hurt, he was engaged in actual car-icing operations, for the reason and upon the ground there is no evidence of any kind or character to substantiate such an allegation.

I assume your Honor would want to rule on them seriatim as we go along?

The Court: Let's see now, I had in mind with-

drawing No. 5: "The defendant, its agents and servants in charge [999] of such switching operations which resulted in said cars being switched against those being iced and on which the said Gerald Stintzi was working." There is no evidence that he was working on a car that was being iced or that there were any cars being iced at the time.

Mr. McKevitt: Do I understand that your Honor has ruled that that motion is well taken?

The Court: Yes, of course, yes, I think it is. I will hear the other side.

Mr. Etter: As to what car-icing operations?

The Court: Your contentions which state that either directly or indirectly the defendant moved cars against cars there were being iced and on which Gerald Stintzi was working.

Mr. Etter: No, I think the evidence shows they were not being iced, but there was a conflict in the evidence as to whether or not an icing operation was being carried on by virtue of unloading of salt.

Mr. McKevitt: Our position in that regard, counsel's position might be well taken if this young man Idaho Davis were the one that was injured, because he said he was unloading salt.

The Court: Let's look at this language now, Mr. McKevitt: "That the defendant, its agents and servants"——I am reading 5 now—— [1000]

Mr. McKevitt: 5 of the statement, your Honor?

The Court: Yes, it is arabic numeral 5 of the VII contention on Page 3: "That the defendant, its agents and servants in charge of said switching operations which resulted in said cars being switched

against those being iced"—when you are carrying salt out of a car, it isn't being iced, certainly—"and on which the said Gerald Stintzi was working"—he wasn't working on any car—"negligently moved said engine and said train and said cars involved at an excessive and dangerous rate of speed under the circumstances obtaining." I don't think there is any evidence of an excessive or dangerous rate of speed here. The speed has been given, but there has been no evidence that that is contrary to safe switching operations.

Mr. Etter: I think that that is probably true. Your Honor, as to the carrying on of any icing operation or the cars being iced, I will concede that. I think, however, that the allegation, so far as it indicates that they switched cars against cars that were adjacent to and next to the loading dock, I think that your Honor's instructions or statement of the issue, in other words, should tailor it down to that fashion, I don't think it should eliminate that there was a switching against cars or there was a switching movement when there weren't any cars at all out there for any purpose. [1001]

Mr. McKevitt: I don't know what subdivision you are referring to Mr. Etter.

The Court: It is admitted, it is undisputed that there were cars there. If there weren't cars there, the boy wouldn't have gotten hurt, I assume.

Mr. MacGillivray: Your Honor is referring to subdivision 5?

The Court: 5, yes.

Mr. MacGillivray: Well, would that not be

amended to conform to the proof to read as follows: "Cars being switched against those around and about which the said Gerald Stintzi was working?"

The Court: But your allegation of negligence there is excessive and dangerous rate of speed, whatever your preliminary might be.

Mr. MacGillivray: That should be stricken.

The Court: Yes, that is all the negligence you allege in that paragraph.

Mr. Etter: That is correct.

Mr. MacGillivray: That is correct.

The Court: Is excessive and dangerous rate of speed.

Mr. McKevitt: Do I understand your Honor correctly that there is no allegation in 5 that—yes, I notice, "That the defendant, its agents and servants in charge of said switching operations which resulted in said cars being [1002] switched against those being iced and on which the said Gerald Stintzi was working." Now that could only refer to cars being iced, and if that goes out, the excessive speed goes out, of course, if that is true, the whole thing goes out.

The Court: I am taking out all of 5.

Mr. McKevitt: Mr. MacGillivray is talking about some sort of amendment to that.

The Court: No, I think I will just take that out. Do you have any other motions?

Mr. McKevitt: I think in view of your Honor's removing that allegation, that that takes with it the allegation of being engaged in icing operations no

matter where it is found in the statement of issues.

Mr. Etter: No.

Mr. McKevitt: Who, Stintzi?

Mr. Etter: That is correct.

The Court: I am just taking out that one allegation. Of course, we want to remember that these things are not proof, they are merely what they claim, and they are not entitled to a verdict unless they sustain them. Of course, the only reason I would take them out would be if there is no evidence to sustain an allegation, and I don't think I should be too exacting about that. They have a right to present their contentions here if there is anything [1003] to support them at all.

Mr. McKevitt: Well, then, as I understand it, your Honor thinks the only portion of the statement of issues that should be subject to motion is Subdivision 5 of the general Paragraph Seventh of the statement of issues? Am I correct in that?

The Court: That is the only one where I see that mention of working on cars being iced or icing. Let's see——

Mr. McKevitt: Right in the Fourth Paragraph on the first page: "On and prior to July 17, 1952, the minor plaintiff was employed by the Addison Miller Company and was engaged as a laborer in the performance of said car icing operations."

The Court: Where do you see that?

Mr. Etter: It is on Fourth.

Mr. McKevitt: No. 4.

The Court: I am not going to send this pleading to the jury and I am not going to read the whole

complaint or the whole statement; I am going to simply tell them that the plaintiff claims that the defendant was negligent in the following particulars and confine it to No. 7.

Mr. McKevitt: No. 7?

The Court: I don't think I need give them all of the pleadings here. I can rely on you gentlemen——

Mr. McKevitt: With that understanding, that you are confining it to 7, if that the allegation that we rise or fall on, why that is okay.

The Court: As I understand it, there aren't any jurisdictional issues here or other issues. All that I have in mind is to tell them that the plaintiff claims that the defendant was negligent in the following particulars; the defendant claims that Gerald Stintzi was contributorily negligent in the following particulars; and that the burden is on so and so, the one asserting negligence or contributory negligence.

Now I think on No. 6, I have grave doubts about this part—have you got 6 there in mind?

Mr. Etter: Sixth Contention?

The Court: Arabic No. 6 on Page 3, yes, of the contentions of negligence.

Mr. McKevitt: Yes, "had full knowledge."

The Court: "That at all times herein mentioned, the defendant, its agents, servants and employees," and I think this should be deleted: "had full knowledge and notice, or in the exercise of ordinary care should have had full knowledge and notice." I don't remember any evidence at all that they had actual knowledge.

Mr. Etter: As I gather it, your Honor, you intend to eliminate "had full knowledge and notice," but to leave [1005] "in the exercise of ordinary care should have known?"

The Court: "Should have known."

Mr. McKevitt: Oh.

Mr. Etter: All right, correct.

Mr. McKevitt: Well, so the record may be complete, may I have it show that my motion is directed toward that paragraph?

The Court: You wish to have it all deleted?

Mr. McKevitt: Yes.

The Court: Yes, I see, all right.

Mr. McKevitt: My reason for that being that even though they had knowledge that the workmen were working in and around cars, they had no knowledge that they were crawling under couplers or between cars and dumping ice in buckets.

The Court: Well, if you got it down that fine, then your motion for directed verdict should be granted.

Mr. McKevitt: Well, I think it should.

Mr. Cashatt: I agree.

Mr. Etter: The company itself and practically every representative knew all about taking sacks over there. I don't know whether they imply they carried them and threw them over the top of the boxcar.

The Court: I might say here, before we call the jury in, I wish to take up these proposed instructions, [1006] and while this isn't too complicated a case, it is a difficult one to instruct the jury on

because I don't send the copies of my instructions with them to the jury room and it is expecting a great deal of them to understand and apply these rules of law which I have to give.

But I think that, looking at it broadly here, and it may assist you somewhat in understanding my position on these proposed instructions, I assume that the relationship, while I haven't had time to examine it and counsel hasn't stressed it either to me or to the jury, I assume that this contract fixes the relationship and the relative rights and duties of the Northern Pacific Railroad Company and Addison Miller with respect to the operation of this icing of cars on the defendant's premises. I assume also that that contract shows that Addison Miller is an independent contractor and not an agent of the railroad company.

Mr. McKevitt: That's right.

The Court: I assume also that the contract doesn't specifically, at least, physically limit the area in which the operations of Addison Miller are to be conducted.

Mr. Cashatt: On that point, your Honor, I would say that it does, because there is a map attached to the exhibit which is outlined in red and referred to as the exact area, the dock itself, the tunnel and the plant.

The Court: What do you have in mind here?

Mr. Cashatt: I have this, your Honor—may I approach the bench?

The Court: Yes.

Mr. Cashatt: This is the area indicated and is referred to in the agreement, your Honor.

The Court: Well, what I have in mind, there isn't anything, at least there is no express language in this contract, which says that Addison Miller may not cross Track 13 or dump its salt sacks to the north of Track 13 or dump its slush ice there.

Mr. Etter: Or carry sacks of salt out of boxcars on the track.

The Court: Yes, or to cross the tracks carrying salt out of boxcars. And I should think that your arrangement there would give Addison Miller the right to operate and put its employees anywhere that is reasonably necessary within the contemplation of both parties to carry out the contemplated operation. Now we are getting on the borderline here when we cross Track 13, and there I think that is a question for the jury. That is my theory of it. The only question for the jury is whether or not under this conflicting evidence, at least conflicting to the extent that different inferences may reasonably be drawn, it is for them to determine whether or not in crossing the track and dumping the slush ice over on the north of Track 13, [1008] Gerald Stintzi was an invitee or a mere licensee or trespasser, and I think that that is a question that I have to submit to the jury.

Mr. McKevitt: You mean his legal status is a mixed question of law and fact as the record now stands?

The Court: Yes, I do, and I think it is to be submitted to the jury under an instruction giving

them the definitions of what constitutes his status in each of those, and in that respect I am going to use a lazy method here and read Judge Steinert's definitions of those three things as set out in Schock vs. Ringling Bros., 5 Washington (2), 599. It is the same definition he gives in the 16 Washington case that you cited here.

Mr. McKevitt: Yes.

The Court: 16 Washington (2).

Mr. McKevitt: I think your Honor was on the Supreme Court in the Ringling Bros. case, were you not?

The Court: Yes, but it is Judge Steinert's definition.

Mr. McKevitt: In which your Honor concurred.

The Court: Better than mine. But, at any rate, my theory is that that is a rather close question, I think here, for the jury to determine. As we all know, of course, the only duty that an owner and occupier of land owes to one who is a licensee or trespasser is to refrain from wilful [1009] and wanton injury, and there isn't any substantial evidence of wilful or wanton injury inflicted upon the minor by the railroad company. So I think in order to recover, it is necessary for the plaintiff to show that Gerald Stintzi was an invitee, and if he were in one of the other status, the verdict would have to be for the defendant.

I might say, in the discussion of these instructions, I am going to ask the reporter to stop taking this. It is really an informal recess, I could call you in chambers, but it will save time and be

easier to sit here and do it, and if I went in my chambers, he wouldn't, so I will just take an informal recess here until we have finished discussing these instructions. It is a long, hard day for the reporter and I wish to spare him as much as I can.

(Whereupon, the Court advised counsel for the respective parties of the action taken with respect to their requested instructions, after which the following proceedings were had out of the presence of the jury:)

The Court: I am going to take a 10 minute recess and then you can start the plaintiff's argument here. I think we ought to use the rest of our time until six, because it is going to be a graveyard shift for all of us, anyway. [1010]

Mr. McKevitt: In other words, we are going to eat before all the arguments are finished?

The Court: Oh, yes, I'm going to send the jury out to have dinner at 6 o'clock and then have them brought back at 7:30.

Recess for five minutes.

(Whereupon, a short recess was taken, after which the following proceedings were had in the absence of the jury:)

The Court: There is one thing that I neglected to mention before the recess, and that is that I have no objection to your stating what in substance you think the Court will instruct on a certain point, but I wish you wouldn't read the instructions which you proposed because I might change the language, you know. The Court always is flexible in its instructions until the last minute. And, also, if you

read them, it makes it necessary for me to explain to the jury that you haven't got a key to the back door of my chambers, it is one that you wrote yourself that I adopted. So I would rather you wouldn't read the instructions, but you may say what you think in substance I will instruct.

Bring them in. [1011]

(Whereupon, oral argument was made to the jury by counsel for the respective parties, concluding at 10:05 p.m. After a short recess, the following proceedings were had:)

Instructions of the Court

The Court: Ladies and gentlemen of the jury: This has been a long and fatiguing day for all of us. I feel that I owe you an apology for keeping you in session at this late hour. I very rarely have night sessions, have them only in cases of what I think are emergencies, and I really think that this is one.

I had hoped that this trial might be concluded in four days, but it turned out that that was not possible. Nobody is to blame for it, it is just that it was a trial in which there was a lot of evidence and a lot of contested issues, and we weren't able to finish within the time allotted. We are on the eve of the Fourth of July holiday, and my commitments are such that if I do not conclude this case now, I would have to set it over until the middle of August, and that, of course, would not be practical for all of you to go home and forget

all about this testimony and come back and try to decide this case in August.

So that we are in a situation where I feel it is unavoidable to have this long night session and to submit [1012] this case to you for your consideration at this late and inconvenient hour.

Now I think even though it is late and I have no disposition to take any more time than is necessary, it might be helpful to you if I explain how a judge formulates his instructions in a civil case in a Federal Court such as this.

The issues are made up of the pleadings and the evidence comes in and the judge pays close attention to it, just as you do and just as the attorneys do. At the conclusion of the case, the attorneys on both sides have the privilege of submitting to me written instructions which they think state the law on issues which they deem important. I take those proposals or requested instructions which they hand to me and I not only look them over carefully, but I discuss them with the attorneys, and it is my duty under the rules to tell them what my disposition will be of their requests, whether I will give their requested instructions or not.

Now that is the reason that you sat out there for, I don't know, 40 minutes, perhaps an hour, from the time the testimony concluded until we came in and started the argument. I was at that time going over these written proposals that the attorneys had submitted to me, discussing them with them and telling them what my action would [1013] be. So that when counsel tells you what he thinks the Court

will instruct, it isn't that he has any key to the back door of the judge's chambers or has any special way of getting knowledge; I tell them what I am going to do with their proposals in open court; and that is the reason counsel are able to accurately predict what the Court is going to instruct so far as the law is concerned.

However, the written proposals, I do not take them as written, I modify them, I change them, sometimes I put in instructions of my own, and part of my instructions will be, as you will see, extemporaneous, as this instruction to you is now. On the more important issues, while I know it is difficult to follow written instructions that are read, it would be much easier for you to follow and for me to do if I could just talk to you as I am now, nevertheless the issues in a case such as this involve very difficult and technical rules of law, and I feel for the sake of accuracy and in order that I may not misstate or overlook something, that it is wise that I read you written instructions on these important issues.

Now, there is a very definite division of authority, responsibility, and function in a civil case between the Court, that is to say the judge, and the jury. I am responsible for questions of law; you are solely responsible for questions of fact. It is your duty to find the facts [1014] in the light of the instructions which I shall give you as to the law, and it is your duty to take my instructions on the law as correct and to follow them.

Now, in the first place, I will just read to you

briefly what it is that the plaintiff contends in this case entitles her to recovery for the injuries sustained by her minor son, Gerald Stintzi. The claims are based upon alleged negligence of the defendant Northern Pacific Railway Company:

"(1) That the defendant, its agents and servants, negligently failed to keep a proper lookout and to use proper care for the safety of the said Gerald Stintzi while he was in the performance of his duties;

(2) That the defendant, its agents and servants, negligently failed to give the said Gerald Stintzi any notice or warning that any railroad cars were to be moved and shoved onto and against the railway cars about which the said Gerald Stintzi was working;

(3) That the defendant, its agents and servants, negligently moved and switched railway cars onto, over and against the said line of cars about which Gerald Stintzi was working; [1015]

(4) That the defendant, its agents and servants, in charge of its switching operations, negligently moved, operated and controlled said switching operations and the cars involved therein;

(5) That at all times herein mentioned, the defendant, its agents, servants and employees, in the exercise of ordinary care, should have had full notice and knowledge that the said Gerald Stintzi and/or other persons employed by other parties and by Addison Miller would be working on or about sail railway cars spotted beside the defendant's loading dock; but that notwithstanding its said con-

structive knowledge and notice, the defendant, its agents, employees and servants, negligently caused the said cars to be switched, moved, or pushed onto and against the said stationary cars spotted and standing on the track adjacent to the defendant's loading dock and where said Addison Miller Company was carrying on its icing operations, without notice or warning of any kind; and

(6) That defendant, its agents, employees [1016] and servants, in charge of said train and cars which were switched negligently, moved the same without keeping the same under reasonable and proper control at all times."

Now the issues are made up by the defendant's denial of each and every one of these claimed grounds of negligence, and also these affirmative defenses or assertions on the part of the defendant, that Gerald Stintzi was himself guilty of negligence which contributed to his injuries and assumed the risk in these respects, namely:

"That he voluntarily placed himself on the defendant's trackage and between two of the cars on said trackage at a time when he knew or should have known that said cars were liable to be moved by defendant, and that he was exposing himself to great danger;

That the said Gerald Stintzi voluntarily entered a place of great danger between two of the cars standing on defendant's trackage in its yards without making any effort whatsoever before doing so to determine whether or not there was any likelihood that such cars might be moved."

Now the plaintiff has the burden of proving by a fair preponderance of the evidence the claims or contentions [1017] or allegations of negligence which I have read to you, and the defendant has the burden of proving the claimed grounds of contributory negligence on the part of the minor Gerald Stintzi.

Now in giving you these instructions and rules of law, which I hope will be of some help to you in determining these issues between the parties, I want you to bear in mind that in a lawsuit each party has its contentions and there are conflicts in the testimony because the contentions are supported by some evidence on the part of the plaintiff, we'll say, that is contradicted or partially contradicted by evidence on the part of the defendant, so we have these two versions in many respects of the lawsuit and of the claims and contentions of the parties. And it is the duty of the Court to give you instructions of the law as to what you shall do in case you adopt either the theory of the plaintiff or of the defendant. I am not the one to decide the facts; you are the ones to decide; so I tell you, in effect, if you adopt the defendant's theory, then you do so and so; if you adopt the plaintiff's, then you do otherwise. So that many times I think it may seem to a jury that the Court is giving contradictory, confusing instructions, when that is not the case, if you follow and understand them as they are intended to be given.

Now, as I have told you, this being a civil [1018] action, a party having the burden must prove his

point by a fair preponderance of the evidence, and the expression "fair preponderance of the evidence" means the greater convincing force or weight of the evidence. It means that which appears to be the more reasonable and more probable happening or event. It does not necessarily mean the greater number of witnesses testifying for or against a given proposition or claimed fact or series of facts, nor does it make any difference on which side the evidence is offered. It means, taking all the evidence on a particular issue into consideration, no matter which side may have offered it, that the convincing weight and force of the evidence is in favor of one side and against the other.

Now the basis of this action of the plaintiff is negligence, and negligence is the failure to exercise reasonable and ordinary care. By the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances and conditions. Negligence may consist in the doing of some act which a reasonably prudent person would not do, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is the want of due care or ordinary care in the particular situation presented. "Due care" and [1019] "negligence" are relative terms and what in one situation might be due care might be negligence in another. So that the measure of duty is always reas-

onable care and caution under the particular circumstances with which we are dealing.

Now the mere fact that an accident happened in this case raises no presumption or inference of negligence on the part of the defendant railroad company. The defendant is not the insurer of the safety of Gerald Stintzi. Negligence is never presumed, but must be established, like any other fact, by a preponderance of the evidence, as I have just defined that term to you.

Now at the outset, I think I should say that in arriving at your verdict, you should not allow yourselves to be influenced or controlled by any consideration or feeling of passion, prejudice, or sympathy for or against either party to this action, nor should you be influenced or controlled in any way by the fact that the defendant is a corporation. It is your duty, and you are required under the law, to decide the case the same as if all the parties to the litigation were natural persons, for all parties to an action are equal before the law and are entitled to equal justice.

It is not necessary that the plaintiff prove the defendant guilty of each separate charge of negligence [1020] alleged in his complaint, but it will be sufficient to entitle plaintiff to recover if you find from a fair preponderance of all the evidence that the defendant was guilty of any one of such acts of negligence and that the same was a proximate cause of the injuries sustained.

Now I might say, for the sake of convenience, I will use the terms throughout, "guilty of negli-

gence" or "guilty of contributory negligence." It is simply a convenient way of saying it, if you find there was contributory negligence or there was or was not negligence. The term "guilty" isn't intended to connote any criminality or criminal responsibility.

Now this accident, as the proof shows here, occurred on the property of the defendant Northern Pacific Railway Company, and I might say that it is important at the outset, too, that there isn't any question but what the injured boy, Gerald Stintzi, was not an employee of the Northern Pacific Railway Company. So I think it is important, and it may be helpful to you to decide, and you must decide from the evidence, just what was the relationship between the land owner, the Northern Pacific Railway Company, and Gerald Stintzi, at the time of his accident.

And under the evidence here, you may find that he was either an invitee, a licensee, or a trespasser, and I will define those terms for you in these words: [1021]

An "invitee" is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant of the premises is then engaged or which he permits to be conducted thereon, and to establish such relationship, there must be some real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates.

A "licensee" occupied an intermediate position

between that of an invitee and that of a trespasser. He is one who goes upon the premises of another either without an invitation, express or implied, or else for some purpose not connected with the business conducted on the land, but goes, nevertheless, with the permission or toleration of the owner.

And a "trespasser" is one who enters the premises of another without invitation or permission, express or implied, but who goes rather for his own purposes or convenience and not in the performance of a duty to the owner or one in possession of the premises.

Now under the law, the only duty which the defendant Northern Pacific Railway Company owed to Gerald Stintzi at the time of his injuries, if he was a mere licensee or trespasser, was not to wilfully or wantonly injure him, and I instruct you, as a matter of law, that [1022] there isn't any substantial evidence here of any willful or wanton injury of the minor Gerald Stintzi by the Northern Pacific Railway Company, so your first task is to determine whether or not Gerald Stintzi was an invitee, under these definitions which I have given you.

In this connection, you are instructed that Gerald Stintzi was an invitee at the time and place of his injury only if he was at said place, that is to say, between the freight cars in question, with the express or implied permission of the defendant Northern Pacific Railway Company, and for the purpose of performing some task connected with the business of the Northern Pacific Railway Company or

which the company permitted to be conducted thereon, and in order to constitute Gerald Stintzi an invitee under the law, it is not enough that he was between the freight cars with the express or implied permission of the Northern Pacific Railway Company; it is also necessary that there was some real or supposed mutuality of interest between Gerald Stintzi and the defendant in the subject to which the former's business or purpose related.

If you should find under this instruction that Gerald Stintzi was not an invitee, then you are instructed that he cannot recover in this action, as I have indicated, and your verdict should be for the defendant.

To further assist you in determining whether or [1023] not Gerald Stintzi was an invitee, you are instructed that even though he was on the premises of the Northern Pacific Railway Company by invitation, he would cease to be an invitee if he went to a place not covered by the invitation. Furthermore, it is the law that one who is on the premises of another by invitation ceases to be an invitee if he makes an unreasonable use of the premises or uses the premises in a more dangerous way than was reasonably contemplated by the invitation.

Under all the foregoing, it is for you to determine whether Gerald Stintzi was an invitee of the defendant Northern Pacific Railway Company at the time and place of his injury, that is, in going between and underneath the couplings of the freight cars in question. If you find that he was an invitee,

then you should proceed to determine whether the Northern Pacific Railway Company was negligent and whether Gerald Stintzi himself was contributorily negligent under the other instructions which I shall hereinafter give you. On the other hand, if you find that he was not an invitee, then, without more, your verdict should be for the defendant.

Now if you find under the instructions already given that Gerald Stintzi was an invitee of the defendant at the place of his injury, then you should next proceed to determine whether the defendant Northern Pacific Railway [1024] Company was guilty of any negligence which was the proximate cause of his injury. In this connection, I charge you that in order to find the defendant railway company negligent in this case, you must find from the preponderance of the evidence, that when the defendant, through its agents and employees, shunted freight cars onto Track 13 and caused them to drift into and against the freight cars between which Gerald Stintzi was located, the defendant, through its agents and employees, knew or should have known, in the exercise of reasonable care, that the employees of Addison Miller Company were engaged in work of such nature that they would be endangered by the movement of the cars. If you should find that the railway company, through its agents and employees, knew or should have known at the time that Addison Miller employees were engaged in work which would cause them to be endangered by the movement of the cars, then the defendant was negligent, and if you further find that

such negligence was a proximate cause of the injuries to Gerald Stintzi, and that Gerald Stintzi himself was not guilty of contributory negligence, your verdict should be for the plaintiff.

On the other hand, if you should find that the defendant railway company, through its agents and employees, at the time it shunted the cars into and against the cars on Track 13 between which Gerald Stintzi was located had no [1025] knowledge or reasonable cause to believe that the employees of Addison Miller Company were so engaged as to be endangered by the movement of the cars, then the Northern Pacific Railway Company was not negligent in moving the cars and your verdict should be for the defendant.

Now if you find under the other instructions that I have given you that Gerald Stintzi was an invitee at the place of his injury, and that the Northern Pacific Railway Company was guilty of negligence which was the proximate cause of his injury, then you should proceed to determine whether or not Gerald Stintzi was himself guilty of negligence which proximately contributed to his injury. In this connection, you are instructed that contributory negligence of a plaintiff, when established, is a complete defense to an action of this type. No matter how negligent the defendant Northern Pacific Railway Company may have been, if Gerald Stintzi was himself guilty of some negligence which proximately and materially contributed to the occurrence of the injury, he cannot recover.

A person is guilty of contributory negligence if

he fails to exercise the care which an ordinarily prudent person would use under the same or similar circumstances and his failure proximately and materially contributes to the occurrence of his injury. Ordinary prudence or reasonable care requires that a person in possession of his [1026] faculties exercise reasonable care for his own safety. One may not cast the burden of his own protection upon another, but at all times owes himself the duty of self-protection. The law will not permit one to close his eyes to danger and, if thereby injured, seek a remedy in damages against another. One is at all times bound to use his intellect, senses and faculties for his own protection.

Therefore, if you should find from a preponderance of the evidence that Gerald Stintzi, in going between the freight cars in question and beneath the couplings, failed to exercise reasonable care for his own protection, and that such failure proximately contributed to his injuries, then Gerald Stintzi was guilty of contributory negligence and cannot recover in this action and your verdict should be for the defendant, notwithstanding that you may also find that the defendant was guilty of negligence.

On the other hand, if you should find that Gerald Stintzi was an invitee and that the defendant was guilty of negligence which was the proximate cause of his injury, a proximate cause of his injury, and you should further find that Gerald Stintzi was not contributorily negligent, your verdict should be for the plaintiff.

Now the fact, if it be a fact, that Gerald Stintzi, in going between defendant's freight cars and under the couplings thereof, was attempting to carry out orders [1027] of his employer, Addison Miller Company, is not to be regarded by you as an excuse for conduct on his part which could otherwise be contributory negligence. Even though he was directed by his superiors to do the very thing that he was doing when injured, he would still be contributorily negligent if you should find that a reasonably prudent person, acting under the same or similar circumstances, would not have gone between the freight cars in question or under the couplings thereof.

Now I instruct you, as a matter of law, that Addison Miller Company in its relation to the defendant Northern Pacific Railway Company was an independent contractor and not an agent. It follows, therefore, that any negligence on the part of Addison Miller Company or on the part of its foreman in directing plaintiff to cross the track in question or in failing to take precautions to protect plaintiff while he was doing so, cannot be considered by you as any negligence on the part of the Northern Pacific Railway Company. The defendant in this case, Northern Pacific Railway Company, is in no way chargeable with or responsible for any negligence on the part of Addison Miller or its foreman which may have caused or contributed to plaintiff's injury.

If you should find that the sole cause of plaintiff's injury was negligence on the part of Addison [1028] Miller Company or its foreman, or that the

sole cause of plaintiff's injury was the concurrent negligence of plaintiff himself and Addison Miller Company or its foreman, then your verdict should be for the defendant.

However, if you find that Gerald Stintzi's injury was proximately caused by the concurring negligence of both Addison Miller Company and the defendant railway company, and you do not find that Gerald Stintzi was guilty of any contributory negligence which proximately contributed to his own injury, then your verdict should be for the plaintiff.

There is evidence here that there was an arrangement, understand, or practice between Addison Miller Company and the defendant Northern Pacific Railway Company that when employees of the former were engaged in icing cars along the icing dock, the Addison Miller foreman would turn on a blue light on either end of the dock as a warning to the railway company employees that the cars along the dock were not to be disturbed. The undisputed evidence, moreover, is that at the time of the accident no blue light was burning on the icing dock. There is also in evidence Rule 805 of the Consolidated Code of Operating Rules, which reads in part as follows:

"Before moving cars or engines in a street or on a station or yard track, it must be known that they can be [1029] moved with safety. Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone."

In this connection, I instruct you that the defendant Northern Pacific Railway Company was required to exercise due care in the movement of its cars, notwithstanding the fact that it had this arrangement which I have described with Addison Miller Company with reference to the blue light and that no blue light was shown or burning on the icing dock at the time of the accident. If defendant Northern Pacific Railway Company had any reason to anticipate that persons might lawfully be employed in, on, under, or about standing cars, it was under a duty reasonably to warn such persons of any movement of the cars which might endanger them.

If you find that Addison Miller, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi in failing to provide a blue light for his protection on the icing dock, and if you further find that the defendant Northern Pacific Railway Company was also guilty of negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which contributed proximately in any measure to the injuries sustained by Gerald Stintzi, [1030] you are instructed that the negligence of Addison Miller cannot be imputed to Gerald Stintzi and Gerald Stintzi is not liable for such employer's negligence, and you will therefore disregard any evidence of negligence of Gerald Stintzi's employer and return your verdict for the plaintiff against the defendant Northern Pacific Railway Company, unless you should further find

from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto.

Now when a railroad company knows or, under the circumstances existing, should have known or anticipated that a person is or might be working on or about a standing railway car, it owes a duty to keep a proper lookout for such person when operating or moving trains or cars and to give a reasonable and timely warning to such person of its intention to operate or move trains or cars in the vicinity or of its intention to move or interfere with the car or cars on or about which the person is or might be working where injury to such person is likely to occur. Failure to maintain a lookout or to give due warning under such circumstances constitutes negligence. If, therefore, you should find from the evidence in this case that Gerald Stintzi was an invitee at the time of his injury, as I have defined the term "invitee" for you, and that the defendant [1031] railway company, through its employees, knew or under the circumstances existing should have known or anticipated that employees of the Addison Miller Company were or might be present and working on and about the icing dock and the railway cars on the tracks immediately adjacent thereto, then I instruct you that it was the positive duty of the railway company to give reasonable and timely warning to such employees of impending movement of cars on such tracks. Failure on the part of the defendant railway company

to give such reasonable and timely warning, under the circumstances outlined, would constitute negligence on the part of the defendant railway company.

Now, ladies and gentlemen, you are the sole judges of the credibility of the witnesses and the weight which is to be given to their testimony. A witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. The jurors should carefully scrutinize the testimony, the circumstances under which each witness testified, and every matter and evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive, state of mind, and demeanor and manner while on the stand. Consider, also, any relation which each witness may bear to either side of the case, the [1032] manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

A witness may be discredited or impeached in several ways, as by contradictory evidence, by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. Now if the jury believes that any witness has been impeached or thus discredited, it is the jury's exclusive province to give the testimony of that witness such credibility, if any, as they think it may deserve. Inconsistencies or dis-

crepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit the testimony. Two or three or more persons witnessing an incident or transaction may see or hear it differently, and innocent misrecollection like failure to recollect is not an uncommon occurrence. In weighing a discrepancy, the jury should consider whether it pertains to an important or unimportant detail or whether or not the discrepancy involves a material issue in the case. If a witness is shown knowingly to have testified falsely concerning any material matter, the jury has the right to distrust such witness' testimony in other particulars and may reject all the testimony of that witness or give it such credit as they may think it deserves. [1033]

Now from time to time the attorneys for one or the other of the parties have interposed objections to evidence. Counsel not only have the right but the duty to make any and all objections which they may deem advisable or appropriate, and no inference or presumption should be indulged in one way or the other by reason of the making of any objections.

Now you have observed also that at times throughout the trial I have been called upon to pass on the question of whether certain offered evidence should be admitted. You are not to be concerned with the reason for such rulings and are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law with which the jury is not concerned. As to any offer of evi-

dence that was rejected, you should not consider the same. You will not consider any evidence that was ordered stricken from the record by the Court, and as to any question to which an objection was sustained, you should not conjecture as to what the answer might have been or the reason why the objection was made.

If I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either the plaintiff or the defendant in this case, you are not to be influenced by any such suggestion. I have tried to be strictly impartial, and if any action [1034] or expression of mine has seemed to indicate the contrary, you are instructed to entirely disregard it.

If I have made any comment on the evidence—I think I have made some in these instructions—but if I did in either these instructions or otherwise in the course of the trial, you may consider, but you are not bound by any such comment. It is your duty to follow my instructions as to the law, but finding the facts is your sole function and responsibility.

Now you should not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or a stipulation conceding the existence of a fact or facts.

Now, members of the jury, I am going to give you some instructions as to the measure of damages in case you should find for and return a verdict for the plaintiff. You will understand, of course, that my giving you these instructions is not intended as

any indication on my part of what I think your verdict should be. I am simply giving you these instructions if you find for the plaintiff, then you shall award damages as follows:

You will ascertain and award such amount in damages, not exceeding $260,845.86, as will fairly and reasonably compensate Gerald Stintzi for such personal injuries as you may find from a preponderance of the evidence [1035] he has sustained.

In arriving at such damages for personal injuries, you may and should take into consideration the nature and extent of his injuries which you find from a preponderance of the evidence that Gerald Stintzi sustained; the pain, suffering and discomfort, both mental and physical, he has endured on account of such injuries; and the pain, suffering and discomfort, both mental and physical, he will with reasonable certainty endure in the future on account of such injuries. You should also take into account such suffering, discomfort, humiliation and embarrassment that he has suffered from his disfigurement and will with reasonable certainty suffer and endure in the future, and you should consider further whether or not his injuries are permanent in character and whether or not they will with reasonable certainty prevent him in the future from engaging in a gainful occupation and whether such injuries will reasonably require future personal care and medical treatment; and you should consider all of these elements and the further element of Gerald Stintzi's loss of function as a result of the injuries sustained by him.

You should also allow to the plaintiff special

damages in such reasonable sum as you may find from the preponderance of the evidence will compensate Gerald Stintzi for hospital expenses, not exceeding the sum of [1036] $6,678.98, not exceeding the sum of $3,000.00 for medical and doctors expenses, and not exceeding the sum of $2,164.00 as and for special nurses, not exceeding the sum of $662.81 as and for necessary prosthetic devices. In no event shall your verdict for special damages exceed the sum of $12,505.79.

Now in the event your verdict should be for the plaintiff, you are instructed that in arriving at your verdict, you are not permitted to add together different amounts representing the respective views of different jurors and to divide the total by 12 or by some other figure intended to represent the number of jurors involved. Any such figure would result in a quotient verdict and would be contrary to law and would be in violation of your oaths.

You are, of course, to give consideration to each other's views and reasoning and honestly endeavor to agree upon a verdict. But such common agreement is to be based upon the final honest belief of the jurors, and must not be arrived at by any mechanical process of addition and division, such as I have described, which would constitute a quotient verdict.

Now when you retire to the jury room to consider your verdict, you will take with you the exhibits which have been admitted in evidence in the case, and your first duty will be to elect a foreman. You will select some [1037] foreman who will act

as your chairman, in effect, and preside over your deliberations in the jury room and sign your verdict when you have agreed upon it.

Now for your convenience two forms of verdict have been prepared here, and you should have no trouble with them, they are very simple. They have the heading of the case, and one of them is: "We, the jury in the above-entitled cause, find for the defendant." The other one has the same heading and reads: "We, the jury in the above-entitled cause, find for the plaintiff and assess damages in the sum of dollar sign blank." You select the appropriate verdict, and when you have agreed upon it, the foreman will sign it. And in Federal Court, in this case, your verdict must be unanimous, that is to say, all 12 of your number must agree upon the verdict which you return. Now when you have reached an agreement, let the bailiff know and you will be brought into court to deliver your verdict in open court.

I will ask the jury to retire now while further proceedings are had in your absence.

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: Counsel has just called my attention to the fact that I inadvertently overlooked his proposed 7, [1038] which embodies the stipulation as to the life expectancy. In some manner or other, I lost it in the shuffle, because this is the first time I have ever seen it, and in taking your exceptions here I will ask you to assume that I will give this one when the jury comes in. I will tell them I over-

looked it and they are not to place any special importance on it, but I will give it to them. In taking your exceptions, you may take an exception to that one, if you care to do so, to No. 7 proposed by the plaintiff.

Let's see, we will start with plaintiff's counsel here. Do you wish to state any exceptions to the Court's instructions? You may take exceptions now to the Court's instructions in the absence of the jury.

Mr. McKevitt: I would rather have them begin the frontal assault.

Mr. MacGillivray: Could we just have a second?

The Court: Yes. I don't think there is any particular order here that should be followed. If you are ready, Mr. McKevitt, you may state your exceptions, and then by that time perhaps the conference will be over between plaintiff's counsel.

Mr. McKevitt: They want me to insult you first.

The Court: All right.

Mr. McKevitt: I will proceed in the interest of time if they are not ready. [1039]

The Court: Are you ready?

Mr. MacGillivray: We know which one we think is bad. We haven't figured out the reasons yet why we think it is bad.

The Court: All right.

Mr. McKevitt: May I proceed, your Honor?

The Court: Yes.

Defendant's Exceptions to Instructions

Mr. McKevitt: The Court having instructed the

jury, and the jury at the time of the taking of these exceptions not having retired to consider of their verdict, the defendant Northern Pacific Railway Company takes the following exceptions to instructions given by the Court:

The defendant excepts to the failure of the Court in the statement of the issues to have recited that one of the defenses of the Northern Pacific Railway Company, as set forth in the statement of issues, was that the plaintiff Gerald Stintzi was a trespasser. I should qualify that by saying that, while we didn't label him as such, I think, Mr. Williams, is it correct that we did specifically recite in the statement of the issues that he had no right to be where he was, which I would take it would be tantamount to the same thing? [1040]

The Court: Did you say that as an affirmative defense?

Mr. McKevitt: No, in our statement of the issues.

The Court: I see.

Mr. McKevitt: Yes. Am I correct?

Mr. Williams: Yes.

Mr. McKevitt: In other words, as I recall, if your Honor pleases, in the recital of the issues and dealing with our affirmative defenses, you simply recited that we have pleaded as a defense, if I was able to take my notes accurately, that he was guilty of contributory negligence, and that the statement of the issues in that regard went no further.

I hope I am not mistaken in that, but that is my

recollection, not having had a copy of the instructions before me.

The Court: Yes, I thought I was giving your affirmative defenses here.

Mr. McKevitt: I may state that while you were giving the statement of the issues, I did refer to our affirmative defenses to the amended complaint and I couldn't find that we had specifically recited that he was a trespasser, and I so advised Mr. Williams, and he said, however, that in our statement of the issues we had referred not specifically to the fact he was a trespasser by so labeling him, [1041] but we did say he was in a place where he had no right to be at the time he was injured, and I think that would be tantamount to calling him a trespasser.

Have you got the particular portion?

Mr. Williams: We don't seem to have a copy of our statement of the issues here, your Honor.

Mr. McKevitt: I wish you would borrow one or get the original file. If we are incorrect in that assumption, I want to withdraw that exception, naturally.

Mr. Etter: Here is a copy of your statement of contentions.

Mr. McKevitt: That is yours?

Mr. Etter: That is mine, that is a statement of contentions. It is mine, but it isn't our contentions.

Mr. McKevitt: Let's see if we have it here.

Yes, Paragraph I, if your Honor pleases, of defendant's statement of contentions, reads as follows:

"That the duties of the plaintiff Gerald Stintzi,

in connection with his employment by Addison Miller Company, did not require him to work and be on, around or about railroad cars of the defendant except the top of such refrigerator cars as were from time to time being iced by Addison Miller Company, and the said Gerald Stintzi had [1042] no right to be elsewhere on, around or about railroad cars of the defendant in defendant's railroad yard at Yardley, Washington, and particularly had no right to be between or under any cars, refrigerator or otherwise, nor any right to be on any of the defendant's trackage."

The Court: Well, the awkward thing about that, Mr. McKevitt, is, if you wish me to, I will instruct that you have the burden of proving that he was a trespasser. I have instructed the jury that if they find he is a trespasser, they should find a verdict for the defendant, because I have assumed that it is the burden of the plaintiff to show that Gerald Stintzi was neither a trespasser nor a licensee, but was an invitee, and if they fail to prove that by a fair preponderance of the evidence, the verdict should be for the defendant. That has been my theory.

Now if you take the position that it is an affirmative defense and the burden was on you to prove he is a trespasser or a licensee, I will instruct them that, because I think that is favorable to the plaintiff.

Mr. McKevitt: If that is your Honor's viewpoint, I will press the proposition no further.

The Court: I did instruct them definitely that if

[1043] they find he is a trespasser, their verdict should be for the defendant.

Mr. McKevitt: The defendant excepts to that portion of the Court's instructions wherein the Court dealt with the effect of concurring negligence, for the reason and upon the ground that there is no proof of substantial character of any probative value that the railway company was guilty of actionable negligence which can be said to have been the proximate cause of the accident.

May I confer just one moment?

The Court: Yes.

Mr. McKevitt: The defendant further excepts to that portion of the Court's instructions which dealt with Rule 805, for the reason and upon the ground that during the course of the trial when plaintiff's counsel injected or attempted to inject a portion of that rule into the evidence, the defendant took the position that, first, there had been no pleading of a rule violation which could be said to have been the proximate cause of this man's injury, that is, no rule violation of the Northern Pacific; on the further ground that Rule 805, as it is now in the record, under any reasonable interpretation could not be held to have been a rule enacted for the benefit of Gerald Stintzi, and particularly for his benefit when it is considered the nature of the work that he was doing at that time.

The defendant excepts to that portion of the Court's instructions which inform the jury that if the defendant had knowledge of or should have anticipated the presence of any of the Addison Miller

employees on or about the dock, that they would be guilty of negligence if they didn't exercise due care. The basis for this exception is that under the evidence in this case, no matter what the duty of the railway company was to Addison Miller employees engaged in icing cars or dealing with salt cars which required them to be in and around or about the cars, that duty did not encompass any duty on the part of the defendant railway company to anticipate that this minor would be engaged in the operation of transporting ice under or over or between cars or under or over couplers of connected cars.

The defendant excepts to the failure of the Court to give Defendant's Requested Instruction No. 3. This exceptions is taken only to the refusal of the Court to give the third paragraph of said instruction, which reads as follows:

"You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous [1045] method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger. Therefore, if you should find from a preponderance of the evidence that Gerald Stintzi, in going between the freight cars in question and beneath the couplings, failed to exercise reasonable care for his own protection——"

The Court: Pardon me, I think you have gotten into what I did read there.

Mr. McKevitt: Oh, maybe I have.

The Court: "Into a position of danger," that is the end of the paragraph.

Mr. McKevitt: Oh, yes, that is a portion——

The Court: I did read that.

Mr. McKevitt: (To the reporter): Will you correct that, Don?

The Court: You have in mind the paragraph that I omitted.

Mr. McKevitt: Yes. The basis of the exception, if your Honor pleases, in that regard is this: That he was, in carrying out the orders of the foreman to dump this ice [1046] north of Track 13, not exclusively confined to the proposition that he had to carry out that order by crawling between cars, because the evidence here shows that he could have walked to the east a distance of not to exceed three cars, or 120 some odd feet, where he could have crossed over the track.

And your Honor will recall that in Mr. MacGillivray's argument, if my recollection is not faulty, that he emphasized to the jury that we might make contention with reference to the procedure that he adopted and contend that he should have gone around these cars, and stated to them that even though he had done so, that if the cars were bumped into, he would have been injured anyway.

And then the further showing is that the ice could have been dumped at some point west of the door leading from the slush pit and without any neces-

sity of going between the cars, or it could have been dumped under the dock, or it could have been dumped between the dock and the track, so he selected, in our opinion, the most dangerous method of all the methods that were open to him.

The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 5 in the language requested by virtue of the fact that the instruction that was requested was qualified by an additional paragraph which dealt, if my memory serves me correctly, with [1047] concurring negligence.

The Court: That's right.

Mr. McKevitt: In other words, it made it an alternative proposition, and our contention is that there was no evidence of concurring negligence.

The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 6.

Before I follow with that request, might I discuss that proposed exception with counsel?

The Court: All right.

Mr. McKevitt: Defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 6, for the reason and upon the ground that the jury should have been told that if they found from a preponderance of the evidence that there were no cars being iced on Track 13, nor any car or cars on Track 13 from which salt was being unloaded by Addison Miller employees during the time that he was crossing between cars, crossing Track 13 between and underneath the couplings of the cars, that they must find for the defendant.

We thought or feel, your Honor, that we are entitled to have an instruction specifically on that point, because the manner in which the situation was covered was too broad in that it permitted the jury to speculate or to conjecture or to find from the evidence that the company [1048] could have been negligent if men were working in or around these cars generally, and your Honor knows the emphasis that was placed by the plaintiff in this case upon the presence of a salt car on that track, and we think that the jury, under the law as heretofore presented, should have been instructed, and under the pleadings, that they must find that he was either doing one or two things or both things intermittently, either icing cars or engaged in salt operations, and if he was doing neither of those things, then he was not in the course of his employment to the extent that he was an invitee upon the tracks.

Mr. Williams: May I supplement that, your Honor?

The Court: Yes.

Mr. Williams: Our theory as to Instruction No. 6, why it should have been given by the Court, is that actually that is the real issue in this case insofar as contributory negligence of the plaintiff Gerald Stintzi is concerned. It is our position in requesting that instruction that that gets to the meat of it and that in that way only can the jury intelligently pass upon the question as to whether Gerald Stintzi was guilty of contributory negligence, because it is our position that if there was no salt

car being unloaded on that track at that time or any cars being iced, then Gerald Stintzi was guilty of contributory negligence as a matter of law, and that is the only thing that could [1049] excuse him from being contributorily negligent as a matter of law, the fact that there were cars, if there were, being unloaded on that track, and that that being the real issue, it seems to us that that is the way that the issue of contributory negligence should have been presented to the jury.

Mr. McKevitt: The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 7. That instruction was to the effect that the Northern Pacific Railway Company was not required to anticipate that any employee of Addison Miller would be engaged in removing ice from the slush pit or engaged in carrying that ice across Track 13 by means of crawling over or under the couplings of any freight cars that were standing on that track. And the instruction in that regard, insofar as the plaintiff was concerned, was proper because it recited, in effect, that if we knew or in the exercise of care should have known that this was a common practice on the part of Addison Miller, if we had actual or constructive notice of such procedure, then we could not avail ourselves of the lack-of-knowledge proposition.

The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 9. That instruction dealt with the proposition that it was the duty of Addison Miller to provide its em-

ployees with safe working areas, including Gerald Stintzi, and dealt with the [1050] proposition that we had a right to assume that Addison Miller was performing its duty towards its employees, and that unless the Northern Pacific had knowledge or knew or in the exercise of reasonable care should have known to the contrary, namely, that the Addison Miller Company wasn't performing its duties, then the jury should have been so informed. In other words, that instruction placed upon Addison Miller the duty of giving proper safety instructions to its own employees. The evidence here from some of these boys is that they had no knowledge of a blue light rule, knew nothing about a rule of that character, which had been instituted or a practice adopted by the company, and so and so forth. And while your Honor did instruct the jury with reference to this practice of custom on the part of Addison Miller and Northern Pacific and its reasonableness, the instructions in no wise cover the duty of Addison Miller to have advised their own employees of that situation. In other words, if there had been a blue light up there and we—well, strike that, I am thinking ahead of myself.

The way I wanted to put that was this: Relevant to the duty of the Addison Miller to have so instructed them, these boys have been informed or these employees that blue lights would protect them against movements of trains onto that track when they were working on or under these cars, and that they didn't ascertain for themselves whether [1051] or not that blue light had been posted, and they

would be negligent, even though the foreman had failed to put the light up.

That is all I have.

Mr. Williams: Just a couple of other things, your Honor.

With reference to our Requested Instruction No. 9, our exception is also based upon our position that that is a correct statement of the law and was not otherwise covered in the instructions, and it was necessary in order to give the jury all of the law necessary to fix the responsibility.

The Court: Are you both taking exceptions to the same instructions?

Mr. Williams: I just wanted to add that.

The Court: I see. I think you should make only one exception to each instruction. After all, it is 11:20 here and we have a time limitation. I want you to make a good record, but——

Mr. McKevitt: That is the only one you are supplementing, isn't it?

Mr. Williams: I had one other I wanted to mention.

The Court: All right, go ahead.

Mr. Williams: With reference to, I believe, the first part of the first requested instruction of the [1052] plaintiff, that portion of it where your Honor instructed the jury as to concurrent negligence of Addison Miller and Northern Pacific Railway Company, a part of that instruction, it said that: "If you find that the defendant Northern Pacific Railway Company is also guilty of negligence in any degree which contributed proximately in any meas-

ure to the injuries sustained by Gerald Stintzi," etc., then they are entitled to recover against Northern Pacific Railway Company; the exception being that that permits the jury to find Northern Pacific Railway Company liable on a finding of slight negligence or of negligence which did not contribute materially to the injury; in other words, does not fix the standard of ordinary negligence upon which any liability of Northern Pacific Railway Company would have to be based.

The Court: What one are you referring to now?

Mr. Williams: It is the one on concurrent negligence. It was a part of the first requested instruction of the plaintiff. I don't know just where it is found in your Honor's instructions.

The Court: I think I can find it here, yes.

Mr. Williams: It was toward the last. It was right after that business about Rule 805, I believe.

The Court: You refer to the one that recites that if they find that the Northern Pacific Railway Company was [1053] also guilty of negligence in any degree or act or failure to act?

Mr. Williams: Yes, of the words "in any degree."

The Court: Or act as charged and claimed by the plaintiff, yes.

Mr. Williams: The words "in any measure," also.

The Court: Yes.

Mr. Williams: That was Plaintiff's Requested Instruction No. 2.

The Clerk: Yes.

Mr. Williams: And, further, we except to the reference in the instructions to Rule 805 of the Northern Pacific Railway Company, for the reason that so far as we can recall, Rule 805 was not introduced in evidence. There was some reference——

Mr. Cashatt: Yes.

Mr. Williams: I'm sorry.

The Court: I noticed at the time here, I didn't have time to go over these word for word, read them, and I noticed when I read this, I was a little puzzled by this statement, also, "in any degree." What did you have in mind in writing it that way, "in any degree," whoever wrote this for the plaintiff: "If you find that the Northern Pacific was also guilty or negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which [1054] contributed proximately," and so on?

Mr. MacGillivray: How does it continue on from there?

The Court: "If you find that the Northern Pacific Railway Company was also guilty of negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which contributed proximately and in any measure."

Mr. MacGillivray: The negligence would have to be under that next sentence there, have to contribute proximately to cause the injuries complained of. Your Honor, in another instruction, has also advised the jury that negligence, to be actionable, has to contribute or be a proximate cause of the injury.

The Court: I think so, yes. I think, taken as a whole, that is a rather small thing. I would word it differently if I were doing it again.

Go ahead, you may take your exceptions.

Plaintiff's Exceptions to Instructions

Mr. MacGillivray: Plaintiff excepts to the failure of the Court to give Plaintiff's Instruction No. 3, or Requested Instruction No. 3, which is an instruction reading:

"While engaged in the performance of his [1055] duties as an employee of the Addison Miller Company, the minor plaintiff Stintzi was an invitee on that part of the premises of the defendant railway company necessary to the performance of his duties as an employee, and to the minor plaintiff the defendant railway company owed the duty of maintaining in safe condition for his use that part of its premises necessary to the performance of the duties required of the minor plaintiff by the Addison Miller Company and further owed to him the duty of exercising reasonable care to avoid injuring him while he was engaged in the performance of such duties. Failure on the part of the defendant railway company to perform these duties owing to the minor plaintiff constitutes negligence."

My position is this, your Honor, that the evidence here is, we have the contract in evidence between Addison Miller and the Northern Pacific placing upon the Addison Miller Company under that contract the duty of performing the icing operations at the Yardley yards for and on behalf of the

Northern Pacific Railway Company. There is no [1056] determination in that contract as to just what part of the premises were necessary to the performance of those icing operations, no limitation in the contract as to what portion of the premises could and would be used by Addison Miller in the performance of those icing operations. The contract, in fact, has a provision in it that the icing operations of Addison Miller at the Yardley yards are to be conducted in accordance with rules and regulations adopted and promulgated by the Northern Pacific Railway Company itself.

Now the evidence we have here, your Honor, is that for ten years prior to July 17, 1952, the Addison Miller Company had continuously used——

The Court: Mr. MacGillivray, this isn't an opportunity for argument or re-argument as to whether the Court should give instructions; the sole purpose of this is to inform the Court what your objections are and to lay the foundation for an appeal to the Court of Appeals.

Mr. MacGillivray: That's right.

The Court: I don't wish to entertain re-argument as to why I should give this instruction.

Mr. MacGillivray: Yes, your Honor.

The Court: Or refuse to give it, I mean.

Mr. MacGillivray: Pointing out the evidence, your Honor, that it makes, to me, the objection applicable, and that is for ten years they had used the part north of Track [1057] 13 for the dumping of sacks and for the dumping of slush ice, and that under that evidence, that is the only evidence in

the record, most certainly that part of the premises was used as a necessary part of the premises to the performance of that part of these icing operations. And if the jury should find that that part of the premises was necessary, and it is the only finding that could properly be made because there is no evidence to the contrary, then as to that part of the premises, he was an invitee.

The question as to going through the two cars in question would not bear on whether he was an invitee in being on that track and crossing the track; that question, to me, would only have a bearing on whether in using that part of the premises necessary to the performance of his duties, he was using that part in a proper fashion and as a reasonably prudent person would have used it. And, in short, it goes only and simply to the question of contributory negligence.

And I think that the Instruction No. 3, had it been given, would have allowed the jury to find that while crossing Track 13 to the far side, and it had been used for ten years, he was an invitee on that portion of the premises. And the jury could find on other instructions given by your Honor that in using that part of the premises in the manner in which he used them, that is, by going through [1058] which he impliedly had been——

The Court: You are not greatly impressed by an expression of what the Court wishes you to do, are you, Mr. MacGillivray?

Mr. MacGillivray: I'm sorry, your Honor.

The Court: When I expressly ask you not to

read instructions to the jury, you got up there and started right out to read one, didn't you? Now I am asking you not to argue with me——

Mr. MacGillivray: I'm sorry.

The Court: State your reasons why this is an incorrect instruction for the record here and conclude with that.

Mr. MacGillivray: I have stated the reasons as to Instruction No. 3.

The Court: All right, go ahead now. The purpose of this is to give your reasons why you are excepting to my instructions or failure to give them, not an extended argument to me as to why I should change my mind. It is 11:30 at night, and I want to get this case to the jury.

Mr. MacGillivray: I'm sorry, your Honor.

Plaintiff excepts to the giving of the Court's instruction—I don't know the number, but it is an instruction formulated on the Defendant's Requested Instruction No. 1 having to do with the invitee question. The exception [1059] is taken first upon the ground that the Court should have determined as a matter of law that at the time and place of his injury, the minor plaintiff was an invitee. The exception is further taken to the instruction that part of the instruction, several parts of it, were to the effect that the jury must find that in going under the railroad cars or between the couplings, that he was expressly or impliedly permitted by the Northern Pacific to do that, it being the contention of the plaintiff that permission to go across the tracks in some proper fashion constituted the invitation,

which permission he had, and that the question whether or not he went through the coupling is a question bearing only on the question of contributory negligence.

Exception is further taken to the instruction, that part of it which reads that:

"To further assist you in determining whether or not he was an invitee, you are instructed that even though he was on the premises of the Northern Pacific by invitation, he would cease to be an invitee if he went to a place not covered by the invitation."

Exception is taken on the ground that the only evidence in the case is that there was an implied invitation, and there had been for some ten years, for employees of the Addison Miller Company to use the ground north of Track 13 and, to [1060] use that ground, necessarily he had to cross Track 13.

Exception is further taken to that portion of the instructions which states it is the law that one who is on the premises of another by invitation ceases to be an invitee if he makes an unreasonable use of the premises in a more dangerous way than is reasonably contemplated. I do not think that is a proper statement of the law. If one is on premises by invitation and he is an invitee, he doesn't lose his status as an invitee merely because he might be guilty of negligence in using the premises as an invitee.

The Court: That isn't what the instruction said, of course. It said if he is invited for one purpose and uses it for another, he ceases to be an invitee. But go ahead.

Mr. MacGillivray: What I had in mind, he ceases to be an invitee if he makes an unreasonable use of the premises or uses the premises in a more dangerous way than was reasonably contemplated by the invitation. I believe, as I say, if he is there by invitation, an invitee, he doesn't lose that status merely because in using the premises, he uses the portion of the premises covered by the invitation in a negligent fashion. That merely goes to the question of contributory negligence.

The Court: Any other exceptions that anybody wishes to take in this assemblage? Do you have any?

Mr. Cashatt: I won't take any. [1061]

The Court: All right, bring in the jury.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: Now, members of the jury, I inadvertently overlooked giving one instruction which I will give you now and which you are to use only in case you should decide that your verdict is to be for the plaintiff, in which event you are instructed that the mortality tables show a white male of the age of 17 years has a life expectancy of 44.27 years. Mortality tables are not conclusive, but merely present the law of averages. You may take this life expectancy in connection with all of the other evidence, together with the plaintiff's physical condition prior to and at the time of the accident, in arriving at the amount of your verdict, if you find by a preponderance of the evidence that the plaintiff is to recover a verdict.

Now, also, I instructed that you were to take with you to the jury room the exhibits which have been admitted in evidence. There is excepted from that instruction Plaintiff's Exhibits 26 to 33, inclusive, which will not be sent to the jury room with the jury, and the Clerk is so instructed.

Now these supplemental instructions that I have given are merely because of oversight and are not to be [1062] given any particular emphasis because I have given them at this time, but are to be considered along with all my other instructions in the case.

You will now retire to consider your verdict.

Oh, yes, swear the bailiffs.

(Whereupon, the bailiffs were sworn to take the jury in charge, and the jury retired to consider its verdict at 11:35 p.m., this date.)

The Court: If I had known that this case was going to extend this late into the night, I would have put it over until tomorrow. But counsel didn't seem to have the facility of hurrying very much, I guess the Court didn't, either, but there seems very little prospect of getting a verdict within a reasonable time now. If they want to work, I will let them work for awhile, but eventually we will have to put them to bed and carry it over until tomorrow, anyway. But I think I will wait an hour, perhaps, and see if they are willing.

Court will recess subject to call. [1063]

[Endorsed]: Filed Nov. 23, 1954.

[Endorsed]: No. 14629. United States Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a corporation, Appellant, vs. Clara Stintzi, Guardian Ad Litem for Gerald Stintzi, a minor, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: January 20, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14629

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellant,

vs.

CLARA STINTZI, Guardian ad Litem of Gerald Stintzi, a minor, Appellee.

APPELLANT'S STATEMENT OF POINTS

In compliance with Rule 17, sub-paragraph 6, of the above Court, Appellant states that the following are the points on which it intends to rely on this appeal:

1. That the District Judge should have ruled as a matter of law that plaintiff-appellee Gerald

Stintzi was not an invitee, but at best a licensee, on appellant's property at the time of his injury.

2. That, Gerald Stintzi being a licensee at best, the District Judge should have granted appellant's Motion for a Directed Verdict or appellant's Motion for a Judgment Notwithstanding the Verdict, since there was no claim or evidence that appellant breached any duty owing to licensees.

3. That, assuming Gerald Stintzi was an invitee, the District Court should have ruled as a matter of law that he was guilty of contributory negligence and accordingly should have granted appellant's Motion for a Directed Verdict or Motion for a Judgment Notwithstanding the Verdict.

4. That in any event the District Court committed errors of law because of which the cause should be remanded for a new trial in the following respects:

(a) The Court erred in admitting in evidence, over the objection of Appellant, testimony concerning portions of Rule 805 of the Consolidated Code of Operating Rules used by Northern Pacific Railway Company.

(b) The Court erred in admitting in evidence, over Appellant's objection, testimony concerning the blue flag rule found in said Consolidated Code of Operating Rules.

(c) The Court erred in admitting in evidence, over Appellant's objection, plaintiff's Exhibits 26 to 33, inclusive, and in permitting, over Appellant's objection, said colored slides to be projected onto an enlarged screen in a darkened courtroom.

(d) The Court erred in instructing the jury with reference to the Consolidated Code of Operating Rules.

(e) The Court erred in giving the following instruction to the jury:

"If you find that Addison-Miller, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi, in failing to provide a blue light for his protection on the icing dock, and if you further find that the defendant Northern Pacific Railway Company was also guilty of negligence in any degree or act or failure to act, as charged and claimed by the plaintiff, which contributed proximately in any measure to the injuries sustained by Gerald Stintzi, you are instructed that the negligence of Addison-Miller can not be imputed to Gerald Stintzi and Gerald Stintzi is not liable for such employer's negligence, and you will therefore disregard any evidence of negligence of Gerald Stintzi's employer and return your verdict for the plaintiff against the defendant Northern Pacific Railway Company, unless you should further find from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto."

(f) The District Court erred in refusing to give that portion of Appellant's requested instruction No. 3 reading as follows:

"You are further instructed that it is the law that one having a choice between methods of doing an

act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger."

(g) The Court erred in refusing to give Appellant's requested instruction No. 5.

(h) The Court erred in refusing to give Appellant's requested instruction No. 6.

5. That the verdict was excessive and should be either reduced by this Court or a new trial directed.

Dated this 21st day of January, 1955.

CASHATT & WILLIAMS,
/s/ By LEO N. CASHATT,
/s/ By F. J. McKEVITT,

Acknowledgment of Service attached.

[Endorsed]: Filed January 24, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Pursuant to Rule 17, sub-division 6, of the Rules of the above Court, Appellant designates the following portions of the record as material to the consideration of this appeal, to be incorporated in the printed transcript:

1. Complaint.

2. Petition for Removal.

3. Bond for Removal.

4. Notice of Filing Petition and Bond for Removal.

5. Amended Complaint.

6. Answer to Amended Complaint.

7. Plaintiff's Statement of Contentions.

8. Defendant's Statement of Contentions.

9. Exhibits 42, 47, and 51. (Note: Other exhibits received in evidence are deemed material to this appeal, but are not suitable for printing, and Appellant assumes that all original exhibits will be considered by the Court.)

10. Reporter's entire record of the proceedings and testimony at the trial.

11. Defendant's Requested Instructions Nos. 3, 5, and 6.

12. Verdict.

13. Judgment on the Verdict.

14. Motion to Set Aside Verdict and Judgment Entered Thereon and for Judgment in Accordance with the Defendant's Prior Motions for a Directed Verdict; and Alternative Motion for a New Trial.

15. Order Denying Defendant's motion to Set Aside Verdict and Judgment Entered thereon and for Judgment in accordance with Defendant's

Prior Motions for a Directed Verdict; and Alternative Motion for a New Trial.

16. Notice of Appeal.

17. Bond on Appeal.

18. Designation of Contents of Record on Appeal, directed to the District Court Clerk, pursuant to Rule 75 of the Federal Rules of Civil Procedure.

19. Order of District Judge Extending Time for docketing record with the United States Court of Appeals for the Ninth Circuit.

20. Statement of Points on which Appellant Intends to Rely, filed with the Court of Appeals for the Ninth Circuit, pursuant to its Rule 17, subparagraph 6.

21. This designation.

Dated this 21st day of January, 1955.

CASHATT & WILLIAMS,
/s/ By LEO N. CASHATT,
/s/ By F. J. McKEVITT,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed January 24, 1955. Paul P. O'Brien, Clerk.

No. 14629

IN THE

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant,

vs.

CLARA STINTZI, Guardian ad Litem for Gerald Stintzi, a minor,
Appellee.

No. 14629

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

HON. SAMUEL M. DRIVER, *Judge*

APPELLANT'S BRIEF

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HON. SAMUEL M. DRIVER, *Judge*

APPELLANT'S BRIEF

STATEMENT AS TO JURISDICTION

This action was commenced in the Superior Court of the State of Washington, for the County of Spokane, by plaintiff/appellee Clara Stintzi, as Guardian of Gerald Stintzi, a minor, against defendant/appellant, Northern Pacific Railway Company, on the 30th day of July, 1952, by service of summons and complaint (Tr. 3). By the action, Stintzi sought to recover for injuries received while crawling beneath the coupling of two freight cars on Northern Pacific trackage

and property, Stintzi at the time being in the course of employment for another concern, the Addison Miller Co. On August 29, 1952, Northern Pacific Railway Company filed a petition for removal with the United States District Court for the Eastern District of Washington, this being within the stipulated time for appearance (Tr. 3-6). On the same day a removal bond was filed with the District Court and notice of the filing of the petition for removal was served on appellee's counsel (Tr. 10-11).

The removal jurisdiction of the District Court was based upon the fact that at the time of the removal appellant was a corporation organized under the laws of the State of Wisconsin, and a citizen of that state, and appellee was a citizen and resident of Spokane County, Washington, in the Eastern District of the State of Washington (Tr. 5). The amount in controversy exceeded the jurisdictional amount, the action being for the recovery of $160,000 (Tr. 4). The removal jurisdiction of the District Court upon the foregoing facts was by virtue of Title 28, U. S. C. A. §1332, 1441 & 1446.

After removal, the case was tried by the District Judge, sitting with a jury, and resulted in a verdict in favor of plaintiff/appellee and against appellant, in the sum of $148,500, on which verdict judgment was entered on July 3, 1954 (Tr. 37-38). Thereafter on July 12, 1954 appellant interposed a motion for judgment notwithstanding the verdict, in accordance with Rule 50 of the Federal Rules of Civil Procedure, and a motion for new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure (Tr. 38-48).

These motions were both denied by order of the District Judge on October 12, 1954 (Tr. 49-50).

On November 5, 1954 appellant filed a notice of appeal with the District Court, the notice being in the manner and within the time provided by Rule 73 of the Federal Rules of Civil Procedure, and the same day appellant filed the required appeal bond (Tr. 51-53). On November 26, 1954 the District Court by order extended the time for filing the record with this Court up to and including January 31, 1955 (Tr. 55). The record was docketed with this Court on January 20, 1955 (Tr. 915).

Upon the foregoing facts, this Court has jurisdiction of this appeal by virtue of Title 28, U. S. C. A. §1291 & 2107, and Rule 73 of the Federal Rules of Civil Procedure.

On November 10, 1954 appellant filed with the District Court a designation, pursuant to Rule 75 of the Federal Rules of Civil Procedure, calling for the inclusion of the complete record and all the proceedings and evidence in the action (Tr. 53-54).

STATEMENT OF THE CASE

Appellant's fundamental position on this appeal is that the District Judge should have directed a verdict for appellant because a total absence of any evidence tending to prove, directly or by inference, under the applicable decisions of the Supreme Court of the State of Washington, that the injured minor, Gerald Stintzi, was an invitee on the premises of appellant railway company, at the time and place of his in-

jury. It is our most vigorous contention that Gerald Stintzi was a trespasser, or at best a licensee, and that there was neither claim nor evidence of any breach by appellant of any duty owing to Stintzi as a licensee or trespasser. In the closing pages of this brief we will discuss certain other specifications of error directed to the rulings of the trial Court which we believe warrant the granting of a new trial in any event, but basically, we contend the action should be dismissed.

We will now endeavor to state the facts in the light of the evidence and inferences most favorable to appellee, with special attention to any evidence which might conceivably tend to prove any of the elements necessary to give Gerald Stintzi the status of an invitee at the time and place of his injury, under the law of the State of Washington.

As an appendix to this brief there is attached a map of the Northern Pacific Railway freight yard at Yardley, Washington (a suburb of Spokane), in which yard appellant Stintzi received his injuries. This map has been prepared for illustrative purposes only and is not to scale, but shows the pertinent portions of the freight yard substantially in accordance with the scale map which is in evidence as Exhibit 1. This freight yard consisted of 55 tracks and teemed with activity twenty-four hours a day. About 55,000 cars a month are handled, several movements of each car being required. Seven switch engines are constantly engaged in shunting cars within the yard (Tr. 525-528).

A red cross has been placed on the appended map to designate the approximate spot where Stintzi was injured while engaged in crawling beneath a coupling between freight cars standing on the Northern Pacific trackage. The entire property shown by the map was owned by appellant Northern Pacific Railway Company, but the ice house, tunnel and ice dock (icing platform) shown on the map were occupied and operated by a separate concern, Addison Miller Company, under a contract in existence between appellant and Addison Miller Company since the year 1936 (Ex. 42, Tr. 674-696).

The contract between appellant and Addison Miller Company is in evidence as Exhibit 42. By its terms, Addison Miller Company occupied, maintained and operated the ice plant, tunnel and icing platform (dock), employing its own personnel for the required work, which included the manufacture of ice, transporting ice as needed through the tunnel and onto the icing platform by means of a conveyor system, and icing and salting refrigerator cars from the elevated platform from which access was gained to the openings atop the refrigerator cars which were at times placed on Tracks 12 and 13 of the railroad yard (Tr. 65, 122-124). The tunnel also afforded a passageway between the ice plant and the dock for Addison Miller personnel. The contract provided that Addison Miller Company was to "prosecute the work under this contract according to its own manner and according to its own methods, and with and by its own means and employees, free from any supervision, inspection or control whatever by the rail-

way company, except only such inspection as may be necessary to enable the railway company to determine whether the work performed complies with the requirements of this contract, it being the intention of the parties hereto that the contractor shall be and remain an independent contractor and that nothing herein contained shall be construed as inconsistent with that status."

Attached to the contract is a blueprint outlining in red the ice plant, tunnel and icing platform as being the property as to which Addison Miller Company was given the right of occupancy (Tr. 694).

The contract further provided that Addison Miller Company was to operate the ice manufacturing plant at its own cost and expense; that it should, as and when directed by appellant, place ice in cars set at the car icing platform; that at its own cost and expense Addison Miller Company was to maintain the ice plant and make such replacements and renewals as might be necessary for the continued efficient operation of the plant; that appellant would furnish salt in cars and Addison Miller Company was to unload and store the same and then from time to time place it in the bunkers of refrigerator cars being iced. For its services as aforesaid, Addison Miller was to receive a rated compensation for the amount of ice and salt placed in appellant's cars.

As shown by the appended map, the icing platform, or ice dock as it is sometimes called, lies between Tracks 12 and 13 of the railway yard, Track 12 being to the south of the dock, and Track 13 to the north. The dock is 1260 feet long, extends east and west, and

is constructed so that ice is placed from the elevated platform into the tops of refrigerator cars on either Track 12 or 13 (Tr. 65, 122-124). When either of these tracks is not occupied by refrigerator cars being iced, such track is used by appellant railway company for general yard purposes, and Track 13 is customarily used for making up eastbound trains (Tr. 550, 555, 635). It is Track 13 that is here involved.

On July 17, 1952, and for about 5 days prior thereto, Gerald Stintzi was employed as a laborer by Addison Miller Company (Tr. 107). He had also been so employed for three weeks during the previous summer. During all of such employment prior to his injury, he had had no occasion to, nor had he set foot on, or crossed any of appellant's trackage (Tr. 173, 183-184, 235). He and other members of the crew of which he was a part were hired by Addison Miller Company, received their compensation from that company and took their orders from a Mr. Robert C. Fincher who was employed by Addison Miller Company as a foreman and had been so employed for 10 years (Tr. 106, 111-112, 705).

About 7:00 o'clock p. m. on July 17, 1952 Mr. Fincher, the Addison Miller foreman, instructed Stintzi and others of the Addison Miller crew to place in buckets some chipped or slush ice that had accumulated within the ice dock and to dump this ice north of Track 13 (Tr. 112-114, 131, 702). Thereupon Stintzi and Allen Maine, another member of the Addison Miller crew, carried the buckets of ice out while two other employees were performing the task of filling the buckets within the ice dock (Tr. 113-

114). When Stintzi and Maine took the first bucket out of the ice dock, they found that a string of coupled freight cars was standing on Track 13, and *they themselves decided* at that point, without consulting Foreman Fincher, that the easiest way to carry out his orders would be to go between the couplings of two of the standing cars (Tr. 131, 193, 214-216). They thereupon proceeded to do this, and Stintzi would first crawl beneath the coupling, following which, Maine would pass the bucket beneath the coupling to him and Stintzi would then dump the ice to the north of Track 13 and then pass the bucket back to Maine and return beneath the coupling (Tr. 127). Proceeding in this fashion, Stintzi had dumped the eighth or ninth bucket of ice and was between the freight cars passing the empty bucket back to Maine when the cars were suddenly set in motion and he was thrown beneath the wheels and sustained the injuries for which this action was commenced (Tr. 129-130).

The standing cars had been set in motion by another string of cars which had been disengaged from a switch engine some distance to the west and permitted to drift into and along Track 13 unattended. (Tr. 386-387). It was established beyond dispute by the evidence that there were blue lights on the north and south sides of the top of the icing dock and that it was the long-established practice between appellant railway company and Addison Miller Company, that these blue lights were to be turned on by Addison Miller Company at such time as its employees were engaged in working in or about cars on either Track

12 or Track 13 (Tr. 538, 765-766). The blue lights on the north side of the dock were to be turned on when Addison Miller employees were so engaged on Track 13, and the blue lights on the south side of the dock were to be turned on when such employees were in and about cars on Track 12 (Tr. 538, 765, Ex. 8). These blue lights were so arranged as to be visible both easterly and westerly from the dock (Tr. 538). The purpose of the blue lights was to warn Northern Pacific switching crews and yard personnel so no switching movement would be made on the track as to which the blue lights were turned on (Tr. 410. 538).

It was also established without dispute that, at the time the switching movement was made onto Track 13 causing Stintzi's injury these blue lights were *not* turned on, and that appellant's switching crew observed that the blue lights were not being exhibited on Track 13 before shunting the unattended cars onto that track (Tr. 395, 409, 703-704).

Stintzi, in defense of his action in going between the couplings of the standing cars, asserted that in the string of cars was a carload of salt which was at the time being unloaded into the ice dock, and he testified that he felt that was "insurance" that the cars would not be moved (Tr. 159-160). His claim that a salt car was being unloaded at the time was vigorously controverted by all of appellant's evidence and witnesses.

Stintzi and Maine further testified that they did not go around the cars, rather than through them, because there were quite a number of cars to the west

and their path would be more or less blocked to the east because of a platform which they claimed was between the alleged carload of salt and the ice dock (Tr. 132, 192-193, 214-216). It was established without controversy that there were areas on the south side of Track 13 where the buckets of ice could have been dumped, but Stintzi defended his action in crossing on the basis that he had been ordered to do so by the Addison Miller foreman (Ex. 37, Tr. 132, 216, 242).

Mr. Fincher, the Addison Miller foreman, testified that for a number of years it had been the practice of Addison Miller employees to cast empty salt sacks and other debris to the north of Track 13, between Track 13 and Track 14 (Tr. 714-715, 744-745). He testified that on only two or three occasions prior to the time in question, during his ten years as foreman had he removed any slush ice from the ice dock and that on those occasions the slush ice had been dumped in the same area north of Track 13 (Tr. 705-706).

Employees of Northern Pacific Railway Company conceded that the area between Track 13 and 14 of the Northern Pacific yard was "a common dumping ground" because Track 14 was what was known as a "cleanout" track (Tr. 547, 554, 788-790, 811). To carry out its function in this respect, the north rail of Track 14 was elevated slightly above the south rail so that cars placed thereon would lean to the south and cars were taken to this track to be cleaned out for further service, debris from within the cars being dumped south of track 14, which would be between Tracks 13 and 14 (Tr. 554). No employee of Northern Pacific

Railway Company, in a position of authority or otherwise, ever testified as to any knowledge that Addison Miller Company was using this area for a dumping ground. Of the Northern Pacific employees who testified, all categorically denied having ever seen any Addison Miller employee crossing Track 13 or having any knowledge that any Addison Miller employees ever did so for any purpose (Tr. 548, 588, 768-769). Furthermore, the record is absolutely barren of any evidence from any source from which it could be inferentially concluded that appellant railway company knew of any practice on the part of Addison Miller employees to cross Track 13 for any purpose and most certainly was there no evidence of permission by appellant that such might be done.

It appeared that the slush ice being carried out by Stintzi and the other Addison Miller employees was an accumulation caused by a tendency of the large cakes of ice to be chipped as they passed around a bend in the conveyor system (Tr. 273). There was a pit below this point where the broken ice fell and in the pit was a drain (Ex. 5).

It appeared from the evidence that the work regularly performed by Addison Miller Company and its employees in and about the ice dock consisted of (1) icing the bunkers of refrigerator cars and placing salt with the ice, which work was performed from the top of the icing platform and over onto the top of the refrigerator cars, and (2) unloading salt into a portion of the ice dock called "the salt house," which work was performed at such time as a freight car loaded with salt had been spotted on Track 13

opposite the salt house, by placing a platform between the floor of the freight car and an elevated opening in the salt house, and carrying the sacks of salt from the freight car into the salt house by means of this platform (Tr. 106, 186, 232). None of this work had ever required the presence of Addison Miller employees on any of appellant's trackage (Tr. 184, 234-235).

When cars were being iced from the top of the icing dock, it was the practice of appellant company to have one of its employees present atop the dock for the purpose of directing the amount of ice and salt to be placed in each car, the requirements of various cars being different in this respect (Tr. 589-590, 661). Also, this Northern Pacific employee, called an ice helper, recorded the amount of ice and salt placed in the cars for the purpose of computing the payments due Addison Miller Company under the contract (Tr. 535, 539).

Appellant, at the close of the plaintiff's case and at the close of all of the evidence, moved for a directed verdict upon the ground that there was no evidence which could form the basis of a finding that Gerald Stintzi was an invitee at the time and place of his injury and that there was no evidence which could warrant a recovery by him as a licensee or trespasser and also on the grounds that appellant was not negligent and that Stintzi was contributorily negligent as a matter of law (Tr. 485-504, 857-858). The District Judge denied both of these motions and submitted to the jury as a question of fact the issue of whether Stintzi was an invitee, correctly informing the jury

that if he was not an invitee he could not recover (Tr. 504-508, 858, 878-880).

SPECIFICATIONS OF ERROR

I.

The District Court erred in denying appellant's motion for a directed verdict at the close of appellee's case.

II.

The District Court erred in denying appellant's motion for a directed verdict at the close of all of the evidence.

III.

The District Court erred in denying appellant's motion for judgment notwithstanding the verdict made pursuant to Rule 50 of the Federal Rules of Civil Procedure.

IV.

The District Court erred in permitting over appellant's objection, the examination by appellee of the witnesses Lavern W. Prophet and James Crump concerning their knowledge of Rule 805 of the Consolidated Code of Operating Rules and General Instructions, which code controlled the conduct of appellant's employees while engaged in railway operations, and further erred in admitting in evidence as Exhibit 47, over appellant's objection, a written excerpt from said Rule 805, reading as follows:

"Before moving cars or engines in a street or on station or yard tracks, it must be known that they can be moved with safety.

"Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone. When cars are moved, they must be returned to their former location unless otherwise provided." (Tr. 800-801).

The witness Prophet was asked whether he had the foregoing rule in mind when he switched the string of cars onto Track 13 which drifted against the standing cars between which Stintzi was passing (Tr. 419-422), and the witness Crump was asked substantially the same questions (Tr. 799-800). In each case the questions were objected to as incompetent, irrelevant and immaterial, for the reason that the said rule was not within the issues of the case and because there was no allegation of a rule violation in the pleadings or statement of issues (Tr. 419, 799).

Following the interrogation of these witnesses concerning the above-quoted portion of Rule 805, a typewritten copy of the quoted portion of the rule was offered in evidence by appellee, and the same objection as previously stated was interposed, but the document, Exhibit 47, was admitted by the Court (Tr. 800-801).

V.

The District Court erred in giving the following instruction to the jury:

"There is also in evidence Rule 805 of the Consolidated Code of Operating Rules, which reads in part as follows:

"'Before moving cars or engines in a street or on a station or yard track, it must be known that they can be moved with safety. Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone.'

"In this connection, I instruct you that the defendant, Northern Pacific Railway Company, was required to exercise due care in the movement of it's cars, notwithstanding the fact that it had this arrangement which I have described with Addison Miller Company with reference to the blue light and that no blue light was shown or burning on the icing dock at the time of the accident. If defendant Northern Pacific Railway Company had any reason to anticipate that persons might lawfully be employed in, on, under or about standing cars, it was under a duty reasonably to warn such persons of any movement of the cars which might endanger them." (Tr. 885-886.)

Objection was duly taken to this instruction before the jury retired, upon the grounds that Rule 805 had been improperly admitted in evidence, that it was not within the issues, and that it was not a rule enacted for the benefit of Gerald Stintzi and particularly for his benefit when he was doing what he was doing at the time, that is, crawling beneath the cars (Tr. 898).

VI.

The District Court erred in giving the jury the following instruction:

"If you find that Addison Miller, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi in failing to provide a blue light for his protection on the icing dock, and if

you further find that the defendant Northern Pacific Railway Company was also guilty of *negligence in any degree* or act or failure to act, as charged and claimed by the plaintiff, *which contributed proximately in any measure* to the injuries sustained by Gerald Stintzi, you are instructed that the negligence of Addison Miller cannot be imputed to Gerald Stintzi and Gerald Stintzi is not liable for such employer's negligence, and you will therefore disregard any evidence of negligence of Gerald Stintzi's employer and return your verdict for the plaintiff against the defendant Northern Pacific Railway Company, unless you should further find from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto." (Tr. 886-887.)

Objection was duly urged to this mandatory instruction before the jury retired, upon the grounds that the words, "negligence in any degree" permitted a recovery by plaintiff upon a finding of slight negligence, and for the further reason that the language "which contributed proximately in any measure" permitted a recovery for negligence which was less than a material cause (Tr. 905-907).

VII.

The District Court erred in refusing to give that portion of appellant's requested instruction No. 3, reading as follows:

"You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties fur-

nishes no excuse for knowingly going into a position of danger." (Tr. 35).

Objection was duly urged to the failure to give this instruction before the jury retired upon the ground that it was appellant's evidence and theory of the case that Stintzi could have walked to the east a distance of about 120 feet and crossed over the tracks without the necessity of crawling under cars, and that he could have also dumped the ice in areas adjacent to the ice dock without the necessity of crossing the track at all (Tr. 899-901).

VIII.

The District Court erred in refusing to give appellant's requested instruction No. 6, reading as follows:

> "Aside from all other instructions that I have given you, you are instructed that if you should find from a preponderance of the evidence that there were no cars being iced on Track 13, nor any car or cars on Track 13 from which salt was being unloaded by Addison Miller employees during the time that Gerald Stintzi was crossing Track 13 between and underneath the couplings of the freight cars, your verdict must be for the defendant." (Tr. 36-37.)

Objection was duly urged to the failure to give this requested instruction before the jury retired, upon the grounds that the only evidence in the record that could possibly excuse Stintzi from being contributorily negligent as a matter of law was his contention that a salt car was being unloaded into the ice dock at the time, which claim on his part was vigorously controverted by appellant's evidence, and that appellant was entitled to have such an instruction on that

point inasmuch as that was the real issue in the case insofar as the contributory negligence of Stintzi was concerned (Tr. 901-903).

IX.

The District Court erred in denying appellant's motion for a new trial upon the basis that the verdict was excessive.

SUMMARY OF ARGUMENT

1. Appellee Stintzi as a matter of law was not an invitee at the place of the injury and so cannot recover. There is no evidence upon which to base a finding that he was either expressly or impliedly permitted by appellant to cross Track 13, and particularly no evidence which could possibly warrant a finding that he had permission to cross Track 13 by crawling beneath the couplers of standing freight cars to do so. Appellant had no interest in Stintzi's errand of carrying out slush ice which occasioned his presence on Track 13, and his errand was of no benefit or concern to appellant, and therefore, even if he had implied permission to cross Track 13, he was only a licensee and cannot recover.

2. Appellee Stintzi was guilty of contributory negligence as a matter of law. Notwithstanding his much disputed claim that a salt car was being unloaded from the string of cars on Track 13 and that this was insurance that the cars would not be moved, such was not a reasonable basis for an assumption on his part that he was safe in so doing, and notwith-

standing such claim, reasonable minds cannot differ on the subject of the extremely hazardous and foolhardy nature of *his own decision* to cross between these cars in a freight yard consisting of 55 tracks teeming with activity.

3. Appellant was not guilty of any negligence which was a proximate cause of the accident. The long-standing practice between Addison Miller Company and appellant required Addison Miller Company to turn on the blue lights on the dock adjacent to Track 13 when its employees were so working as to be endangered by any movement on that track, and the undisputed evidence discloses that the blue lights were not so turned on. Appellant and its employees had a perfect right to rely on that practice and to believe that cars could be switched onto Track 13 with safety in the absence of the blue light, and under these circumstances the sole proximate and efficient cause of Stintzi's injuries was the failure of Addison Miller Company and its foreman to turn on the blue lights.

4. Aside from the foregoing, the District Court fell into error, justifying and requiring a new trial, in the particulars hereafter discussed and, in any event, the verdict is so excessive that it should be reduced.

ARGUMENT

A. Specifications of Error I, II & III.

These specifications involve our basic contention that Gerald Stintzi as a matter of law was not an invitee and so cannot recover. This being a diversity of citizenship case, the Federal Courts, under the rule of *Erie R. R. Co. vs. Tompkins,* 304 U. S. 64, 82 L. ed. 1188, are governed by the case law of Washington, where the cause of action arose. We will therefore deal chiefly with the decisions of the Supreme Court of Washington, since in some respects as to the questions here involved, that Court is not in accord with other jurisdictions.

In Washington it has been repeatedly and uniformly announced that the only duty that the owner or occupier of a premises owes to a licensee or trespasser thereon, is to refrain from wilfully or wantonly injuring him.

The most recent pronouncement of this rule is in *Dotson vs. Haddock,* 146 Wash. Dec. (Adv. Sheets) No. 1, p. 47, 278 Pac. (2d) 338. In that case, not yet incorporated in the bound volumes, the Court said:

> "It has been repeatedly held by this Court that, as to a licensee, the owner or occupant of land owes only the duty of not wilfully or wantonly injuring him. (Citing cases.) * * * Appellants make reference to several decisions from other jurisdictions. In general, these decisions seem to sanction the form of concealed danger rule suggested in the *Christiansen* case and in the Restatement. Insofar as such decisions tend to support a less rigid rule, they are definitely out of harmony with the established law of this state.

We are not disposed to sanction such a departure from our present rule."

See also:

McNamara vs. Hall, 38 Wash. (2d) 864, 233 Pac. (2d) 852;

Deffland vs. Spokane Cement Co., 26 Wash. (2d) 891, 176 Pac. (2d) 311;

Garner vs. Pacific Coast Coal Co., 3 Wash. (2d) 143, 100 Pac. (2d) 32.

It will thus be seen at the outset that in Washington a much more restricted duty is owed to licensees and trespassers than obtains in many other jurisdictions. The Supreme Court of Washington has been unwilling to recognize or adopt various exceptions and liberalizations of the foregoing rule which have grown up elsewhere.

The Court in several decisions has defined wantonness as an act in reckless disregard of the safety of the injured person, after discovering his peril.

Price vs. Gabel, 162 Wash. 275, 298 Pac. 444;

Garner vs. Pacific Coast Coal Co., 3 Wash. (2d) 143, 100 Pac. (2d) 32.

In this case, there was neither pleading nor proof of a wanton or wilful injury to Stintzi. The District Judge recognized this and instructed the jury that they must find that Stintzi was an invitee or he could not recover (Tr. 879-880). It is thus apparent that if it can be said, as a matter of law, that Stintzi was not an invitee at the time and place of his injury, the judgment must be reversed and the action dismissed.

Two elements are essential to give one the preferred status of an invitee on the premises of an-

other; (1) he must be on the premises of the other with the permission or consent of the other, express or implied, and (2) he must enter the premises for a purpose connected with the business in which the owner or occupant of the premises is engaged, and there must be some mutuality of interest between him and the owner as to the purpose of his visit. Thus, in *Christiansen vs. Weyerhaeuser Timber Co.,* 16 Wash. (2d) 424, 133 Pac. (2d) 797, an en banc decision to which we will later refer in more detail, the Court said:

> "An invitee is one who is either expressly or impliedly invited onto the premises of another for some purpose connected with the business in which the owner or occupant of the premises is then engaged, or which he permits to be conducted thereon; and to establish such relationship, there must be some real or supposed mutuality of interest in the subject to which the visitor's business or purpose relates. * * * In this connection, it is also the rule that liability upon an implied invitation is limited by the extent of the invitation and does not extend to injuries received on a portion of the owner's premises not covered by the invitation."

And in *Kinsman vs. Barton & Co.,* 141 Wash. 311, 251 Pac. 563, it is said:

> "Permission and community of interest are necessary. But permission is the only element making up the relationship of a licensee, and without it a person would become a trespasser."

It is apparent and consonant with the foregoing authority that if the first element is lacking, that is, that the injured person is on the premises of the other without permission or consent, express or implied, he is a trespasser even though the second ele-

ment of mutuality of interest is present. Thus, if I see that my neighbor's lawn needs cutting and, in a spirit of helpfulness, but without any permissive basis, undertake to cut it, I am a trespasser, notwithstanding that I am wholly serving his interests in what I am doing.

If the first element of express or implied permission or consent is present, but the second element of mutuality of interest is absent, then the injured person is but a licensee. It is only when both the first and second elements are present that the injured person is an invitee.

In this case, Stintzi, without question, was an invitee while he was in the ice dock, or on the platform, or in the tunnel, or in the ice house, or while he was unloading salt from the interior of a box car and across the elevated ramp into the salt room, or while he was working between the elevated platform and the tops of refrigerator cars in icing operations. He was clearly so invited by appellant by virtue of the contract between it and Addison Miller Co.; but it is our position that such were the limits of his invitation and that he ceased to be an invitee when doing anything else or going to any other portion of the railway company's premises. In crossing Track 13, and in particular, in doing so in a highly dangerous manner most assuredly not countenanced or intended by appellant, Stintzi had neither express nor implied permission, nor did appellant have any interest in what he was doing. In other words, we contend that neither of the two foregoing elements of permission and mutuality of interest were present,

and in any event both elements assuredly were not present.

We now propose to discuss each of the foregoing two elements as applied to this case, having in mind what our Supreme Court elsewhere said in the case of *Christiansen vs. Weyerhaeuser Timber Co.,* 16 Wash. (2d) 424, 133 Pac. (2d) 797.

> "Since the respondent could be held liable, if at all, only upon the theory that the deceased was an invitee at the particular time and place of the alleged injury resulting in his death, *the burden rested on the appellant* to prove that, as to the respondent, the deceased then and there occupied the legal relationship of an invitee."

(1) No Permission, Express or Implied.

There is absolutely no evidence in the record of any express permission given by appellant to Addison Miller Co. or any of its employees to cross Track 13 for the purpose of dumping debris or slush ice, or for any other purpose. We are certain that appellee will make no contention to the contrary; therefore it is only necessary to consider whether appellant impliedly permitted such to be done. There seems to be no Washington decision specifically defining implied permission, but the general rule is well established. In 38 Am. Jur. 758, Negligence, §98, it is said:

> "An invitation to enter may be implied from conduct of the owner or occupant, or of someone else with his permission, which he knows, or reasonably should know, might give rise to the belief in a mind of a person ordinarily discerning, that the owner or occupant intended such person to come upon the premises. * * * As a general principle, the fact that the premises are main-

> tained in such a condition as to be attractive, even to the point of tempting entry thereon, does not constitute an allurement or inducement which is the equivalent of an invitation to enter * * *."

In Restatement of the Law of Torts, Volume 2, §330 (Comment d.), it is said:

> "The consent which is necessary to confer a license to enter land, may be expressed by acts other than words. Here again the decisive factor is the interpretation which a reasonable man would put upon the possessor's acts."

In Black's Law Dictionary (4th Ed.), it is said:

> "An invitation may be *express* when the owner or occupant of the land by words invites another to come upon it or make use of it or of something thereon; or it may be *implied* when such owner or occupier by acts or conduct leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared and allowed to be used. (Citing many cases)."

What acts or conduct were there on the part of appellant or its agents tending to indicate that appellant permitted and intended that the area between Tracks 13 and 14 was to be used by Addison Miller Company as a dumping ground? There was no evidence whatsoever of any such acts or conduct, and we are confident that appellee will be unable to show otherwise by reference to the record.

It is not disputed that Track 14 was a cleanout track and that appellant used the area south of Track 14, lying between Tracks 13 and 14, as a dumping

ground. There was also evidence by the testimony of Mr. Fincher, foreman for Addison Miller Co., that Addison Miller Company employees had made it a practice for a considerable period to cast empty salt sacks into that area, although it does not appear whether they were thrown across Track 13 or carried across (Tr. 714-715). There was also testimony by Foreman Fincher that on two or three previous occasions he had caused slush ice to be dumped to the north of Track 13 (Tr. 705-706).

However, there was no evidence by any Addison Miller employee, or by any Northern Pacific employee or from any other source, that appellant railway company ever knew of or consented to the foregoing practices of Addison Miller Company, and there was most certainly no evidence that anyone from Addison Miller Company had ever before crawled beneath or between standing cars or that appellant had ever countenanced such a practice. On the contrary, there is affirmative evidence from various Northern Pacific employees, including the yardmaster, assistant yardmaster and the foreman of the switching crew that they had never observed, in the area between Tracks 13 and 14, any salt sacks or slush ice, and that they had no knowledge whatsoever that Addison Miller and its employees were using this area as a dumping ground (Tr. 425, 538, 547-548, 588, 661; 768-769, 788-790).

It seems self-evident that the acts and conduct which can give rise to an implied permission must be acts and conduct directed toward the one asserting the permission. Here, we have a dumping ground maintained on appellant's premises. That fact, without more, surely cannot confer a permission on others to dump there, no matter how close to the dumping group they may be situated or engaged. The further fact that, notwithstanding, such persons have used the dumping ground without any knowledge or consent of the owner, cannot change the situation.

That the invitation to Addison Miller employees extended only to the limits of the icing dock or platform and did not extend onto Track 13 or across that track to the dumping area is best illustrated by the case of *Christiansen vs. Weyerhaeuser Timber Co.,* 16 Wash. (2d) 424, 133 Pac. (2d) 797. The facts in that case are strikingly similar. There, Weyerhaeuser Timber Co. owned and operated a mill at Everett, Washington and a wharf or pier adjacent thereto, at which vessels would moor for the purpose of taking aboard the company's lumber products. The plaintiff Christiansen was a member of a crew of a vessel which moored at the wharf and was in the process of taking aboard a cargo of the defendant's lumber products. On the opposite side of the wharf from which the vessel was moored was an electrical outlet, and it was the long-standing practice of the crew of this vessel, which regularly called at the wharf, and also the long-standing practice of the crews of other vessels, to stretch a cable from the vessel across the wharf and plug it into this outlet for the purpose of oper-

ating the electric lights on the vessel during the hours of darkness, during which time loading operations were not in progress. Christiansen was electrocuted while at the electrical outlet for the purpose of unplugging the cable one morning. The Court there held that Christiansen was an invitee while on the wharf in the area required by the loading operations, but that he ceased to be an invitee when he went to the opposite side of the wharf to remove the cable from the electrical outlet. In that case, it appeared that the timber company had permitted the practice of vessels using the electrical outlet to supply current during the night, and to that extent that decision differs from the facts here. The Court held, however, that such permission only created a license, not an invitation, since Christiansen was at a portion of the premises not covered by the invitation of the timber company and was there for a purpose in which the timber company had no interest.

We fail to see how Stintzi and the other personnel of Addison Miller Company, by virtue of the contract or the dealings otherwise with appellant, had any permission or invitation to go upon the premises of Northern Pacific Railway Company beyond the immediate confines of the ice dock, tunnel and ice house, except for the purpose of unloading salt from box cars as heretofore described. If Stintzi had been inside a box car on Track 13 which contained salt or was traversing the ramp between such a box car and the icing dock, or had been placing the ramp between the box car and the icing dock, he would clearly have been an invitee. Or if he had been atop a refrigerator

car while placing ice in the bunkers, he would likewise have been an invitee, but when he was elsewhere on appellant's premises, beyond the confines of the ice dock, tunnnel and ice house, we say that he was beyond the limits of his invitation and without any permission, express or implied, and was not an invitee nor licensee, but, in fact, a trespasser. The fact that he was directed to do what he did by the Addison Miller foreman cannot alter the matter or change his status as respects appellant. Somewhere was a line defining the limits of his permission, and we say that line was south of Track 13.

Furthermore, if it could be said that Stintzi and other Addison Miller employees had implied permission to cross Track 13, could it possibly be said that they had permission to do so by the most dangerous expedient of crawling beneath the coupling between standing freight cars? In *Hansen vs. Lehigh Valley Railway Co.* (3rd C.A.), 120 Fed. (2d) 498, the Court quoted with approval from Cooley on Torts (4th Ed.), as follows:

> "A person is only an invitee as long as he keeps within the limit of the invitation. * * * The invitation may be limited as to space, time, and method of user of the premises. * * * The invitee must use the premises in the manner contemplated by the terms, express or implied, of the invitation. If he uses them in a different manner he loses the protection to which he is entitled as an invitee. In the words of Lord Atkin, 'This duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purpose for which he has been invited. He is not invited to use any part of the premises for purposes which

> he knows are wrongfully dangerous and constitute an improper use.' As Scrutton, L.J. has pointedly said, *'When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters.'* " (Italics ours.)

If permission to cross Track 13 is to be implied, there is most assuredly no evidence that appellant railway company by any acts or conduct ever evinced permission or consent that Addison Miller employees could do so by passing between and beneath the couplings of standing cars. It is of course inconceivable that the railway company would have ever given such permission and no reasonable person could justifiably infer such permission from anything short of express consent. As is said in 44 Am. Jur. 653, Railroads, §431,

> "In any case, it is said that only express consent will serve to license a thoroughfare across a train."

Stintzi and his fellow employees did not have express consent to cross Track 13, there were no acts and conduct shown on the part of appellant from which implied consent or permission might be inferred, and most certainly there could be no implication of permission to cross the track in the hazardous fashion which he followed. We therefore submit that this Court should rule as a matter of law that he was a trespasser at the time and place of his injury and in consequence cannot recover.

(2) No Mutuality of Interest.

Assuming, for the purposes of argument, that there was some basis in the evidence for a finding that ap-

pellant had impliedly permitted Addison Miller employees to enter upon and cross Track 13 by crawling beneath cars, still Stintzi was only a licensee in so doing unless appellant railway company had some interest in the errand which he was at the time performing. This is the second element of mutuality of interest, heretofore referred to, necessary to give Stintzi the status of an invitee at the time and place of his injury.

As to this element, the case at bar is indistinguishable from *Christiansen vs. Weyerhaeuser Timber Co.*, 16 Wash. (2d) 424, 133 Pac. (2d) 797, the facts of which have been previously detailed. There, permission existed for Christiansen, a member of the crew of the vessel, to go to the opposite side of the wharf in connection with the practice of using the electrical outlet to supply current to the vessel during the night. The Court said,

> "Most important of all is the fact that the evidence fails absolutely to disclose any mutuality of interest between respondent on the one hand and the ship owners and their employees on the other, in the alleged errand of the deceased at the time immediately preceding his death. There is no showing of any agreement or understanding between the respondent and the owners of the ship whereby the respondent obligated itself to furnish electricity to the vessel after it had shut down its generators. There is no showing of any benefit to the respondent in having lights on the ship after loading operations for the day had ceased. It was of no concern to the respondent how the ship, when idle, maintained its lights, whether by its own generators continuing to function as in the daytime, or whether by kerosene lamps after the generators had shut down. In

fact, it did not matter to the respondent whether the ship then had lights at all. The savings of fuel by the vessel in shutting down its engines in no way affected the respondent.

"It is true that the ship, through the members of its crew, made use of respondent's facilities by plugging a cable into the Benjamin fitting on the farther side of the wharf, but so far as the record discloses that was at most simply by permission of the respondent. In any event, the practice employed was solely for the benefit of the ship and its crew and had nothing to do with any operation in which the respondent was concerned. Permission without mutuality of interest, however, simply constitutes a license, not an invitation; nor does long-continued use by permission convert a licensee into an invitee, for, as stated by Judge Pound, in *Vaughan v. Transit Development Co.,* 222 N. Y. 79, 118 N.E. 219, 'the law does not so penalize good nature or indifference nor does permission ripen into right.' "

Here, there was no showing of any interest that appellant had in the disposal by Addison Miller Co. of chipped or slush ice which might accumulate beneath the conveyor inside of the premises let by appellant to Addison Miller Co. By the express terms of the contract, appellant's only interest as to the premises occupied by Addison Miller Co. was the icing of refrigerator cars and the unloading and storing of salt within the dock to be used in connection with such icing operations. The manner in which ice was manufactured, conveyed through the tunnel and onto the top of the ice dock, was wholly left to the discretion and control of Addison Miller Co. So also was the matter of cleaning up the premises, the contract providing that Addison Miller Co. should "maintain" the premises (Tr. 687).

As to what has just been said, the case of *Hansen vs. Lehigh Valley Railway Co.* (3rd C.A.), 120 Fed. (2d) 498, is most pertinent in point of fact. There, the plaintiff was the superintendent of a wrecking contractor who was engaged in tearing down buildings adjacent to certain of defendant's trackage. The defendant railway company furnished gondola cars for the contractor to load with metal scrap from the wrecking operations. The plaintiff was injured because the defendant's cars had been carelessly spotted on its trackage without being adequately braked or chocked. The contractor was using a crane to load the scrap onto the gondola cars, with plaintiff directing the operation. He observed that the crane cable was coming in contact with the edge of the defendant's gondola car and, desiring to avoid damage to the cable, he was placing a piece of lumber between the cable and the car. While so engaged, the car rolled forward, causing his injury. The Court said:

> "We think these facts bring the case within the 'outside of purpose' or 'excess of limitation' rule as a matter of law. The invitation to the wrecking contractor's employees went no further than the loading of defendant's freight cars. The method by which the material to be loaded was procured was none of its concern. So the defendant-railroad company was not interested in the particular arrangement of wall, cable and crane. *A fortiori* it was not interested in the protection of the cable. In acting to preserve it from friction, plaintiff was serving his own employer's purpose and not coming within any use sanctioned by the railroad company. * * * The learned trial judge was therefore in error in leaving the question of invitation to the jury."

It was a matter of no importance to appellant how Addison Miller Co. disposed of the debris incident to its operations, including empty salt sacks, slush ice and the like. There was no showing of any circumstances which compelled Addison Miller Company to dispose of such debris across Track 13. There was nothing to prevent the slush ice from being melted down so that it would pass out the drain at the bottom of the pit where it accumulated, nor anything to prevent the slush ice, empty salt sacks and other debris from being transported back through the tunnel to be disposed of in some safe place beyond the railroad yard proper. Furthermore, the exhibits show that there was a large open area to the west where the ice could have been dumped without the necessity of crossing any tracks (Ex. 1, 15, 43).

There was no claim that at the time in question the slush ice had accumulated below the conveyor to such an extent as to impede icing operations in any way. Nor were there any refrigerator cars waiting to be iced, nor any expected in the immediate future (Ex. 38, Tr. 581-582). Appellant had no more interest in the dumping of this slush ice than it had in the disposal by Addison Miller Company of other miscellaneous debris which might from time to time be swept from the floors of the ice dock, tunnel or ice house.

The Supreme Court of Washington has made it clear that the mutuality of interest necessary to create the relationship of invitee requires a material or pecuniary benefit to the owner of the premises and that an incidental or immaterial benefit is insufficient. In

Dotson vs. Haddock, 146 Wash. Dec. (Adv. Sheets) No. 1, p. 47, 278 Pac. (2d) 338, the Court said:

> "We are of the opinion that, before a person may attain the status of an invitee, it must be shown that the business or purpose for which the visitor comes upon the premises, is of material or pecuniary benefit, actual, or potential, to the owner or occupier of the premises. This requirement has been given implicit recognition by this Court in prior cases. (See *Kinsman v. Barton & Co.,* 141 Wash. 311, 251 Pac. 563; *Christiansen v. Weyerhaeuser Timber Co.,* 16 Wash. (2d) 424, 133 Pac. (2d) 797. Appellants argue that, since the meeting was held at respondents' home, for their convenience and benefit to save them the expense of hiring a baby sitter, appellant wife met all the qualifications of an invitee on this occasion. We must agree with respondent that such incidental benefit will not be sufficient to characterize the visitor as an invitee."

During the trial neither counsel for appellee nor the District Judge gave indication of their position as to what interest appellant had in Stintzi's errand at the time in question. In consequence, we are unable to anticipate what arguments may be advanced in this connection. It may be contended that it was in appellant's interest that the slush ice be removed so that the icing of appellant's refrigerator cars would not be interrupted or delayed. Such an argument would be without evidentiary basis and invalid on the authority of *Kinsman vs. Barton & Co.,* 141 Wash. 311, 251 Pac. 563. In that case, the plaintiff was employed in a restaurant. The restaurant occupied a room in defendant's meat packing plant. Plaintiff's employer, the owner of the restaurant, had been permitted to use defendant's room without charge

or rent. The Court held that the plaintiff under the circumstances was but a licensee because mutuality of interest was lacking, and said,

> "The appellant (plaintiff) contends that this interest is shown by the fact that respondent let her employer have the use of the restaurant without charge or rent; that this fact shows that respondent wanted a nearby place where its employees could obtain their noon meals. But the deduction which appellant draws is nothing more than a possible one. It could be argued with as much plausibility that appellant's employer was not charged any rental because respondent did not consider the room to be of any value to it, or because it desired to be of some assistance to appellant's employer. There is an entire lack of affirmative testimony that respondent wanted the restaurant on its premises for its benefit. The mere fact that respondent did not make a charge for the use of the room is too slender a thread upon which to hang a mutuality of interest."

Here, any claim that appellant railway company had any interest in the disposal of slush ice across Track 13 would likewise have to be based purely on speculation and conjecture. There is no affirmative showing that it had any such interest. There being no mutuality of interest, we submit that at best Stintzi was but a licensee at the place of his injury and, irrespective of any implied permission to be there, cannot recover.

In further support of Specifications of Error I, II and III, we contend that Stintzi, no matter what his legal status might have been, was guilty of contributory negligence as a matter of law. Notwithstanding his much disputed testimony that a salt car was among

the string of freight cars on Track 13 and was being unloaded at the time, and that he felt this was "insurance" that the cars would not be moved, it is difficult to see how reasonable minds could differ on the subject of the extremely hazardous and foolhardy nature of *his own decision* to cross between these cars in a freight yard consisting of 55 tracks teeming with activity.

Stintzi was 17 years old at the time and should be charged with mature judgment. He was a bright, alert young man who had worked for four years on construction projects, in mines, and in driving trucks (Tr. 156). This Court can take judicial notice of the type of activity and the constant danger within a large railroad freight yard.

Exhaustive research on our part has failed to disclose any case where anyone engaged in passing between standing coupled railroad cars has ever been permitted by an appellate court to recover, while on the other hand, there are countless cases where persons injured while so engaged have been held contributorily negligent as a matter of law.

Southern Ry. vs. Thomas (Ky.), 92 S.W. 578;

Koke's Adm. vs. Andrews Steel Co. (Ky.), 149 S.W. 968;

Brackett Adm. vs. L. & N. Ry. (Ky.), 111 S.W. 710;

Central Railroad vs. Ryles (Ga.), 13 S.E. 584;

Lambrakis vs. Chicago etc. Ry. (Iowa), 199 N.W. 994;

Gulf Ry. Co. vs. Dees (Okla.), 143 Pac. 852;

L. & N. Ry. vs. White (Ky.), 297 S.W. 808;

Cato vs. St. Louis S. F. Ry. (Ark.), 79 S.W. (2d) 62;

St. Louis S. F. Ry vs. Shepherd (Ark.), 109 S.W. (2d) 109.

Also in support of Specifications of Error I, II & III, we contend that appellant railroad was not guilty of negligence in the premises as a matter of law, no matter what Stinzi's legal status may have been at the time. The undisputed evidence was that in accordance with long-standing practice, there were blue lights provided at the icing dock which were to be turned on when Addison Miller employees were in and about standing cars on Track 13, for the purpose of warning Northern Pacific employees and freezing the track so that no switching movements would be made on Track 13 which might endanger such Addison Miller employees (Tr. 410, 538, 765-766). Likewise undisputed is the evidence that these blue lights were *not* being displayed and were *not* turned on at the time in question, and that if they had been turned on, the switching crew would have seen them and would not have made the switching movement which caused Stintzi's injury (Tr. 395, 409, 703-704).

It is our position that with this practice as to the blue lights, appellant and its employees had a right to rely on such practice and had a right to believe that the cars could be moved safely onto Track 13 in the absence of the blue light and that the sole proximate cause of Stintzi's injuries was the failure of the Addison Miller Company foreman, Mr. Finch-

er, to turn on the blue lights upon instructing Stintzi and the other employees to carry the ice across Track 13.

We most earnestly believe that this judgment should be reversed and the action ordered dismissed because appellee Stintzi as a matter of law was not an invitee, and in any event, because he was guilty of contributory negligence as a matter of law, and because appellant was not guilty of any negligence which was a proximate cause of the accident.

B. Specifications of Error IV & V.

These specifications have to do with our claim that the District Court erred in permitting cross-examination of appellant's witnesses as to whether they had in mind at the time in question Rule 805 of the railroad operating rules, and the Court's further error in admitting a written excerpt from said rule in evidence as Exhibit 47, and our further claim that the Court erred in instructing the jury as to said portion of Rule 805.

The amended complaint contained no allegation which either directly or indirectly charged the appellant with negligence in the violation of any operating rule (Tr. 12). Appellee's statement of contentions following a pre-trial conference contained no allegation charging the defendant with the violation of any operating rule (Tr. 25). The injection of a rule violation into the trial of this case came about in the following manner: Laverne W. Prophet, the foreman

of the Northern Pacific switching crew, was called as a witness on behalf of the appellee. On his direct examination he was in no wise interrogated with reference to Rule 805 or any portion thereof (Tr. 377-408). On cross-examination by appellant's counsel, the witness was not interrogated in any wise with reference to Rule 805; he was only asked as to the presence or absence of a blue light on the Addison Miller dock when the switching took place. This subject of blue lights had already been opened up on Prophet's direct examination by appellee's counsel (Tr. 395, 403). It has already been pointed out that it was the duty of Addison Miller Company to display a blue light on top of the ice dock when any of its employees were engaged in icing operations, which would serve as a warning to the switching crews of the appellant that no switching was to be done on Track 13. It is conceded that there was no such light on the evening Gerald Stintzi was injured. On redirect examination by appellee's counsel he was interrogated as follows:

> "Q. Then you talk about the blue light, Mr. Prophet. Is that some rule adopted by the railroad? A. That was in the book of rules when I hired out. Q. And that is the one rule you had in mind when you turned these 14 cars loose the night of July 17th, the blue light rule? A. I don't quite understand you, sir. Q. Did you have in mind any other railroad rule when you turned those cars loose that night? MR. McKEVITT: Objected to as incompetent, irrelevant and immaterial. There is no allegation of a rule violation in the pleadings or statement of issues. * * * THE COURT: I will overrule the objection. * * * A. Yes, sir. Q. You did? A. Yes, sir. Q. Did you have in mind at that time Rule 805 of the Consolidated Code, reading as follows . . . MR.

McKEVITT: Your Honor, I am going to object to this, of going into this Consolidated Code of Operating Rules. There is nothing in the pleadings here to indicate in any manner that this man was injured by virtue of the violation of a rule enacted for his protection. MR. ETTER: Failure to warn is alleged in three separate allegations in different fashion. THE COURT: Well, does this rule have to do with warning? MR. ETTER: Certainly it has to do with warning. MR. CASHATT: Your Honor, but the employee here was an Addison Miller employee. MR. ETTER: Yes, but this rule has to do with warning anyone. Anyone. MR. MacGILLIVRAY: Let's read the rule and then make the objection. MR. McKEVITT: Well, if you read the rule, why then - - MR. MacGILLIVRAY: May I hand the rule to your Honor? THE COURT: Yes. MR. McKEVITT: Let the Court read the rule. MR. MacGILLIVRAY: 805, marked there in pencil, your Honor. (Document handed to Court). THE COURT: I will overrule the objection. The record may show the objection. Q. (By MR. MacGILLIVRAY): Mr. Prophet, at that time when you turned those cars loose drifting down Track 13, did you have in mind this rule, being Rule 805 of the Consolidated Code, 1945 Edition, reading as follows: 'Before moving cars or engines in a street or on station or yard tracks, it must be known that they can be moved with safety.' Did you have that in mind? A. In the back of my mind, yes, sir. Q. Pardon? A. Probably in the back of my mind, yes, sir. You can't hold 900 some in the front of your mind. Q. Well, did you consciously have in mind that rule on that night? A. I don't know whether I had it consciously or not. MR. McKEVITT. May it be understood I have a general objection? THE COURT: Yes, the record may show the continuing objection. Q. (By MR. MacGILLIVRAY): Mr. Prophet, did you have in mind that night this section of Rule 805: 'Before moving or coupling to cars that are being

loaded or unloaded, all persons in or about the cars must be notified and cars must not be moved unless movement can be made without endangering anyone.' MR. McKEVITT: Same objection. Q. (By MR. MacGILLIVRAY): Did you have that rule in mind? MR. McKEVITT: Same objection. THE COURT: All right, overruled. Q. (By MR. MacGILLIVRAY): Did you have that rule in mind consciously that night? A. I didn't know that those cars were being loaded or we would - - Q. You didn't know they weren't? A. That they were being loaded or unloaded. Q. And you didn't know that they were not being loaded or unloaded, did you? A. No. sir." (Tr. 419-422.)

On cross-examination the witness James Crump was interrogated by appellee's counsel as follows:

"Q. Mr. Crump, you spoke about blue lights. You have a blue light rule in the operating rules? A. That's right. Q. And are you familiar with the operating rule book? A. Yes. Q. Are you familiar with Rule 805? A. Not by number. Q. By contents? A. Beg pardon? Q. Are you familiar with it by its contents? A. Yes. THE COURT: A copy may be substituted. Q. (By MR. MacGILLIVRAY): Mr. Crump, were you familiar with that section of Rule 805 of the Consolidated Code reading as follows: 'Before moving cars' - - MR. McKEVITT: Your Honor, for the purpose of the record, the defendant objects to the introduction of that rule or any portion thereof into this case as not being within the issues. It has not been pleaded and it is not contended or asserted that we violated any rule that was enacted for the benefit of Addison Miller employees. THE COURT: All right, the record will show the objection. Overruled. Q. (By MR. MacGILLIVRAY): Mr. Crump, were you on July 17, 1952, at 8:15 p. m., immediately before you turned these 14 cars loose in front of the yard office, familiar with that section of Rule 805 of the Consolidated Code reading as follows: 'Before mov-

ing cars or engines in a street or a station or yard track, it must be known that they can be moved with safety' A. Yes. Q. And were you familiar with this section of Rule 805: 'Before moving or coupling to cars that are being loaded or unloaded, all persons must be notified and cars must not be moved unless movement can be made without endangering anyone.' A. Yes. MR. MacGILLIVRAY: Ask, your Honor, the admission of the quoted sections of Rule 805 of the Consolidated Code. A copy of the sections can be substituted for the complete Consolidated Code to be placed in evidence. MR. McKEVITT: Same objection as we previously stated. THE COURT: Yes, the record will show the same objection, and it will be overruled and the exhibit admitted. That is 47, isn't it? THE CLERK: That is 47. Now I have marked Plaintiff's 48, 49 and 50 for identification. (Whereupon, the said sections of Rule 805 were admitted in evidence as plaintiff's Exhibit No. 47)" (Tr. 799-801).

In order to make clear that this rule had no application to the issues as joined by the amended complaint and appellee's statement of contentions, and without waiving its objection to the portion introduced by appellee, the defendant introduced in evidence the entire rule (Tr. 812-813, Ex. 51). It reads as follows:

"805. When it can be avoided, engines must not stand within 100 feet of a public crossing, under bridges or viaducts, or in the vicinity of waiting rooms, telegraph offices, or near cars which are occupied by passengers.

"*Before moving cars or engines in a street, or on station or yard tracks, it must be known that they can be moved with safety.*

"*Before moving or coupling to cars that are being loaded or unloaded, all persons in or about the cars must be notified and cars must not be*

moved unless movement can be made without endangering anyone. When cars are moved, they must be returned to their former location unless otherwise provided. (Italics supplied—portion of rule introduced by appellee over appellant's objection).

"Cars containing livestock must not be switched unnecessarily or cut off and allowed to strike other cars.

"Care and good judgment must be used in switching cars to avoid damage to contents and equipment, and it must be known that necessary couplings are made and that sufficient hand brakes are set.

"When switching at stations or in yards where engines may be working at both ends of the track, movements must be made carefully and an understanding had with other crews involved.

"When switching or placing cars they must not be left standing so close as to not fully clear passing cars on adjacent tracks or cause injury to employees riding on the side of cars. Cars must not be shoved blind or out to foul other tracks unless the movement is properly protected."

It is appellant's position that this rule had no application to the work being performed by Gerald Stintzi at the time he was injured. The rule should be considered in its entirety. It will be noted that the last sentence of the second paragraph of said rule, on which appellee so heavily relied, was entirely omitted. That sentence reads as follows: "When cars are moved they must be returned to their former location unless otherwise provided."

In the instant case there was no movement of cars such as this rule contemplates. The phrase "all per-

sons in or about the cars" certainly was not intended to cover a non-employee of the defendant who was attempting to crawl either under or over the drawbars and who was not performing any work which had anything to do with these cars or the movement thereof.

The "persons" referred to in this rule could only have reference to: (a) Railway employees performing an assigned duty of either repairing the "cars," loading the same or unloading the same; (b) Third persons lawfully on the railway property and engaged in some duty in which the railway company and the third parties' employer had a mutual interest.

Assuming for argument that Stintzi was an invitee, a reasonable interpretation of this rule would not require the railway employees to anticipate that he would be engaged in the kind of work he was doing and more especially the manner in which he was performing it. The application of this rule was tantamount to making the appellant railway company an absolute insurer of Stintzi's safety. Even under the Federal Employer's Liability Act the railway company is only required to exercise reasonable care for the safety of its own employees; it is not an insurer of their safety.

> *Northern Pacific Ry. Co. vs. Mely,*—Fed. (2d)—, (decided by this Court December 13, 1954).

That the trial Court was confused with reference to the application of the portion of Rule 805 referred to

is shown by the record. When the witness Prophet was on the stand the following took place:

> "MR. CASHATT (appellant's counsel): As I see it, your Honor, the way it is in the case now, no matter what a man is doing, if he is crawling between cars, and so on, the rule is not applicable to the situation here. There is no evidence he was unloading or doing anything of that type; the only undisputed evidence is that he was crawling under the couplers."
>
> "THE COURT: Well, here is the position it puts the Court in: This witness says that he is relying on the blue light rule, and it seemed to me proper cross-examination to call to his attention other rules that appeared on their face to be applicable, general language in there as to moving cars and when it doesn't appear that it is safe to do so. * * *"

As a matter of fact, the witness Prophet was not relying on a blue light *rule*; his whole testimony indicates that he was referring to the presence or absence of a blue light which it was the duty of Addison Miller, Stintzi's employer, to place on top of the ice dock and which would serve as a warning to railway employees that they were not to do any switching on that track because icing operations were in progress.

The instruction to the jury covering this rule placed a powerful weapon for argument in the hands of appellee's counsel. By implication it is not *de hors* the record to assert that powerful use was made of it. It can well be said that it was the very heart of the jury's verdict.

C. Specification of Error VI.

This specification of error is directed against the following instruction given by the Court:

> "If you find that Addison Miller, the employer of Gerald Stintzi, was guilty of negligence which proximately contributed to the injuries sustained by Gerald Stintzi in failing to provide a blue light for his protection on the icing dock, and if you further find that the defendant Northern Pacific Railway Company was also guilty of *negligence in any degree* or act or failure to act, as charged and claimed by the plaintiff, *which contributed proximately in any measure* to the injuries sustained by Gerald Stintzi, you are instructed that the negligence of Addison Miller cannot be imputed to Gerald Stintzi and Gerald Stintzi is not liable for such employer's negligence, and you will therefore disregard any evidence of negligence of Gerald Stintzi's employer and return your verdict for the plaintiff against the defendant Northern Pacific Railway Company, unless you should further find from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto." (Tr. 886-887.)

We have italicized the language against which we complain. It is our position that this language permitted appellant to be held liable in this case upon a finding of slight negligence, or in other words, imposed upon appellant the duty to use an extraordinary or high degree of care. Furthermore, the language, "which contributed proximately in any measure" authorized a verdict against appellant for negligence which was less than a material cause.

As to the last-mentioned language, the following appears in 38 Am. Jur. 715, Negligence, §63:

> "An injury cannot be attributed to a cause, unless, without it, the injury would not have occurred. Accordingly, the mere concurrence of one's negligence with the proximate and efficient cause of a disaster will not impose liability upon him; it is well settled, however, that negligence, in order to render a person liable, need not be the sole cause of an injury. It is sufficient for such purpose that it was an efficient concurring cause, that is, a cause which was operative at the moment of the injury and acted contemporaneously with another cause to produce the injury, and which was an efficient cause in the sense that except for it, the injury would not have occurred."

Nowhere did the Court define to the jury the language, "which contributed proximately in any measure," and the jury was left to its own resources as to the meaning of the phrase. We again say that the instruction permitted and in fact directed a verdict against appellant upon a finding of slight negligence, which was less than an efficient and material cause of the injury.

In accordance with the usual practice in the District Court for the Eastern District of Washington, the Judge informed counsel in advance of the arguments as to which of their requested instructions he proposed to give. The above instruction was plaintiff's requested instruction No. 2 and counsel were so informed by the Judge in advance of the arguments that this requested instruction was to be given. Appellee's counsel thereafter, in arguing to the jury, stated that it was expected that the Court would instruct

the jury to that effect, and great emphasis was placed upon the words "in any degree," and the words "in any measure" in the argument.

We therefore submit that the error in this respect was most prejudicial and may have had much to do with the resulting verdict against appellant.

D. Specification of Error VII.

Error is here claimed upon the refusal of the District Court to give that portion of appellant's requested instruction No. 3 reading as follows:

> "You are further instructed that it is the law that one having a choice between methods of doing an act which are equally available and who chooses the more dangerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger." (Tr. 35.)

As before stated, objection was duly lodged against failure of the Court to so instruct, upon the ground that this was a part of appellant's theory of the case. The evidence disclosed that there were no more than 3 freight cars standing to the east of the point where Stintzi passed between the couplers which would involve a distance of not more than 120 feet, at which point he could have crossed open track (Tr. 703, 540). Also, the evidence disclosed areas adjacent to the ice dock where the ice could have been dumped without crossing any tracks. The evidence further shows that Stintzi himself chose to go between the cars (Tr. 131, 193).

The above-quoted requested instruction correctly states the law.

38 Am. Jur. 873, Negligence §193.

Scharf vs. Inland Emp. Ry., 92 Wash. 561, 159 Pac. 797.

Clark vs. N. P. Ry., 29 Wash. 139, 69 Pac. 636.

It needs no citation of authority that each party is entitled upon proper request to instructions embodying his theory of the case. Certainly appellant was entitled to this instruction embodying its theory, and we submit that the requested instruction should have been given to adequately guide the jury in reaching a correct determination on the issue of the contributory negligence of Stintzi.

E. Specification of Error VIII.

Appellant requested the District Court to give the following instruction:

> "Aside from all other instructions that I have given you, you are instructed that if you should find from a preponderance of the evidence that there were no cars being iced on Track 13, nor any car or cars on Track 13 from which salt was being unloaded by Addison Miller employees during the time that Gerald Stintzi was crossing Track 13 between and underneath the couplings of the freight cars, your verdict must be for the defendant." (Tr. 36-37.)

This instruction was requested because the District Court had already indicated that he proposed to submit to the jury the issue of whether Stintzi was an invitee, which necessarily meant that the issues of

negligence and contributory negligence were also going to be submitted.

As heretofore stated, Stintzi and his friend, Allen Maine, testified that in the string of cars between which they were passing there was a salt car being unloaded into the ice dock and they felt that was insurance that the cars would not be moved. Against their testimony, appellant produced numerous railway records to show positively that there was no salt car being unloaded at the time and no car containing salt in the string of cars. Nevertheless, we appreciate that, in view of the testimony of Stintzi and Maine, an issue of fact was created and the jury was entitled to disregard all of such records and find that there was a salt car being unloaded at the time.

This testimony of Stintzi and Maine, however, afforded Stintzi's only escape from contributory negligence as a matter of law. Assuming that there was no salt car being unloaded at the time, it is our position that reasonable minds could not differ on the proposition that Stintzi was grossly negligent in himself choosing to go between these cars. If there was no salt car being unloaded, he had no basis whatsoever for assuming or believing that these cars would not be moved at any time. He made no claim that he had any other assurance from anybody that they would not be moved, nor did he claim any other knowledge or basis for an assumption that they would not be moved, aside from the alleged salt car.

Therefore, it was and is our position that the real issue as to whether or not Stintzi was contributorily

negligent was the truth or falsity of his testimony and the testimony of Maine as to the unloading of the salt car at the time. If, in fact, a salt car was being unloaded, a jury could still find him contributorily negligent; but if there was no salt car being unloaded then we say he was necessarily contributorily negligent as a matter of law.

It is our position that this requested instruction was necessary in order to insure that the jury would place the issue of the salt car in its proper perspective. Without this instruction, the jury, under the other instructions, could have concluded that there was no salt car but that Stintzi, nonetheless, was not contributorily negligent. Without this instruction, the jury had no guide whatsoever to the proper consideration of this all-important factual issue.

This requested instruction was somewhat akin to a special interrogatory on this vital issue. The failure to give it prevented appellant from having a fair trial, particularly because appellant's records so conclusively show that there was no such a salt car.

Again it needs no citation of authority that each party is entitled to instructions on his theory of the case when properly requested. This was a requested instruction embodying appellant's theory of the case and the very heart of the defense. We earnstly submit that it was error very prejudicial to appellant to fail to give it, and that, in any event, a new trial is fully warranted therefor.

F. Specification of Error IX.

It is contended by appellant that the damages found by the jury are excessive from any viewpoint; $148,500 was the amount of the verdict on which judgment was entered. Appellee established special damages in the sum of $12,505; it is reasonable to assume that the full amount of the same was included in the verdict; if this be true, then general damages in the sum of $135,995.00 were awarded.

This boy was injured during a school vacation. Primarily, his permanent impairment consisted of the loss of his right leg at the hip. No earning capacity previous to his injury was established. We believe that the amount of this award was to a large extent influenced by the Court's instruction that the jury

> "* * * should consider further whether or not his injuries are permanent in character and whether or not they will with reasonable certainty prevent him in the future from engaging in a gainful occupation * * *."

In addition thereto the admission in evidence of Exhibits 26 to 33, over appellant's objection, undoubtedly influenced the jury in arriving at the amount of the verdict. These pictures of Stintzi's body were exhibited to the jury in an open, darkened courtroom by means of having them projected against a beaded screen 40 inches by 40 inches, by the use of a projector which enlarged said pictures twenty to twenty-one times their normal size. A detailed explanation of each exhibit as it was thrown on the screen was given by the witness, Dr. Valentine. The full nature and extent of the boy's injuries had been gone into at

great length by the doctor prior to the showing of these pictures. His testimony in that regard, and apart from what he said concerning the pictures, covers approximately 17 pages of the record (Tr. 443-460). These pictures could not have failed to arouse the passion, prejudice and sympathy of the jury.

Admitting the seriousness of the injuries sustained, they were not of such a character as to permit a jury to determine under the evidence that this boy could not in the future engage in a gainful occupation. The evidence disclosed that he planned to study law at Gonzaga University in Spokane, Washington (Tr. 200). He is bright and intelligent and with the proper education he can develop high earning capacity in intellectual pursuits.

The amount of $135,995.00 can be put out at interest at as low a rate as 2½% and would yield approximately $4,000.00 per year; at 3%, $4,079.00 per year; at 6%, the legal rate, $8,159.00 per year. He could thus live off the interest alone and at his death would leave the principal unimpaired, an estate of $135,995.00. Such a result is not in accord with the legal principles governing the awarding of compensatory damages for personal injury. The size of the verdict is such as to constitute a penalty or punitive damages. There is no way to account for its size except that it was arrived at by passion, sympathy or prejudice and was not the result of cool, dispassionate consideration.

CONCLUSION

On the basis that appellee Gerald Stintzi was not an invitee on the premises of Northern Pacific Rail-

way Company at the place of his injury, particularly in view of the extremely hazardous and dangerous use that he was making of the premises at the time, we most earnestly contend that this judgment should be reversed, and the action dismissed and Stintzi left to his remedy through his employment.

We further contend, upon the material uncontroverted facts as to the blue light custom, the failure of Addison Miller Company to turn on the blue lights, and Stintzi's own decision to crawl beneath the couplings of these standing freight cars with no reasonable basis for assuming that it was safe to do so, that appellant was not guilty of any negligence which was a proximate cause of the injury and that Stintzi was himself guilty of contributory negligence as a matter of law, and that for these further reasons, the judgment should be reversed and the action dismissed.

We further contend that in any event the judgment should be reversed and a new trial directed for the errors assigned.

Lastly, we contend that, because of the excessiveness of the verdict, a new trial should be ordered, or at least a reduction of the verdict alternatively ordered.

Respectfully submitted,

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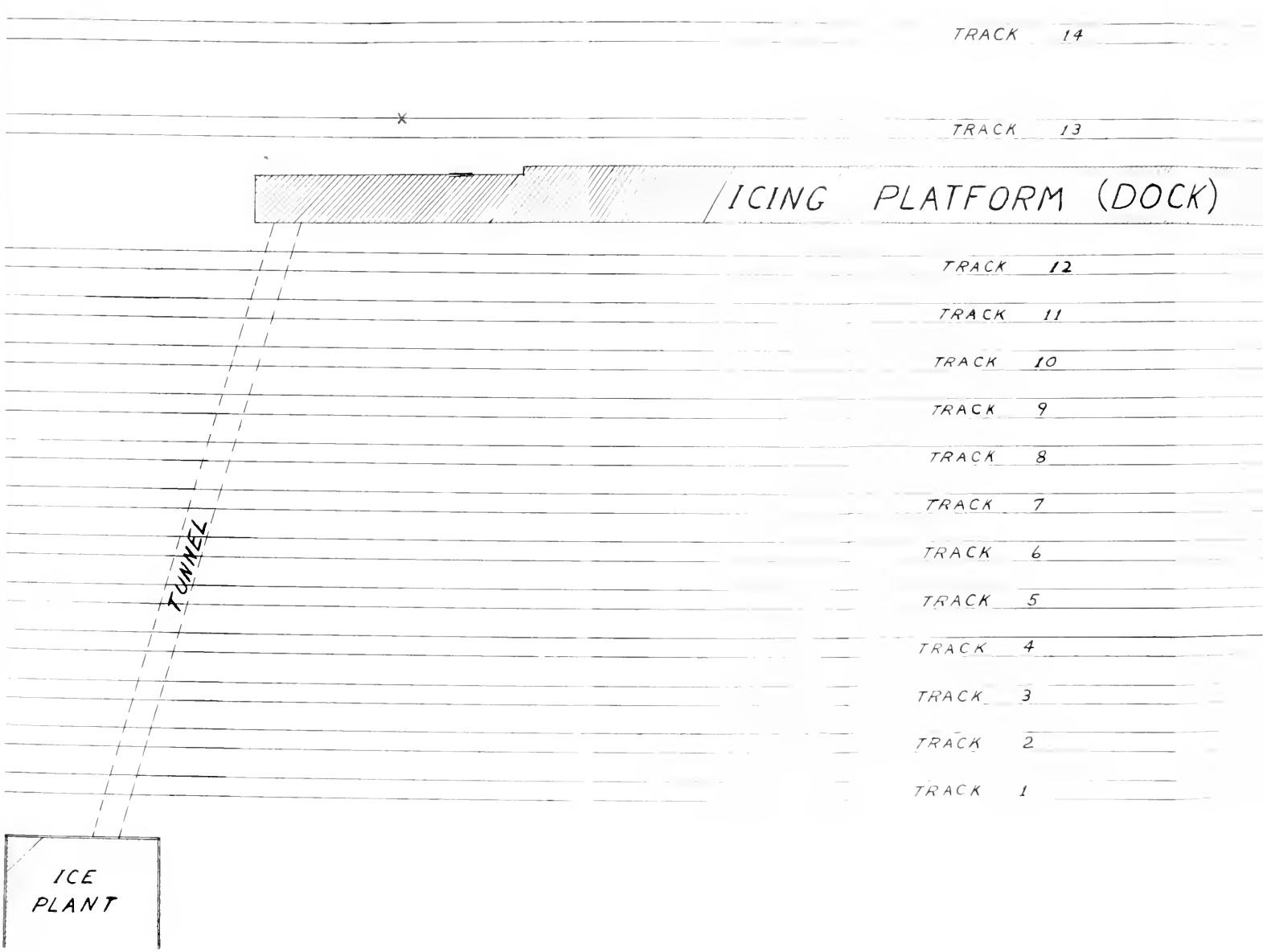
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TRACK 1
TUNNEL
ICE PLANT

No. 14629

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant,
vs.
CLARA STINTZI, Guardian ad Litem for Gerald Stintzi, a minor,
Appellee.

No. 14629

Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

HON. SAMUEL M. DRIVER, *Judge*

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JURISDICTION

The appellee accepts the jurisdictional statement of the appellant.

RESTATEMENT OF THE CASE

Appellant acknowledges the rule that upon appeal involving the legal sufficiency of the evidence, the facts must be viewed in the light of the evidence and inferences therefrom most favorable to the appellee (App. Br. 4). Appellant then proceeds to disregard the rule by stating the evidence and drawing inferences therefrom in the light most favorable to itself. For that reason a restatement of the evidence is necessary.

The accident in question occurred July 17, 1952 at approximately 8:20 p.m. on track 13 immediately north of the icing dock on appellants freight yard premises at Yardley, Washington (Tr. 374, 828). Appellants freight yard runs east and west, is one mile in length and 6 to 8 city block in width (Exs. 1, 37, Tr. 525, 664). The yard contained some 55 tracks running generally east and west, sloping to the center of the yard where is located the icing dock (Exs. 1, 37, Tr. 763-764). South of the icing dock is the ice plant where ice is manufactured and which is connected to the icing dock by an underground tunnel (Exs. 1, 2, 3, Tr. 67-68). The yardmaster's office is 2050 feet west of the icing dock (Ex. 1, Tr. 71). Track 13 is immediately north of the icing dock, the south rail of 13 being within 4 to 5 feet of the north side of the dock. When freight cars are upon track 13, the south side of the cars are within 3 feet of the north side of the icing dock (Tr. 546, Exs. 10, 16). Track

12 is immediately south of and equidistant from the icing dock (Ex. 1). The top of the icing dock (icing platform) is 15 feet above ground (Tr. 70), and 1260 feet in length (Tr. 540, 541). The icing platform is equipped with overhead electric lights on light poles at 40 foot intervals on both the north and south sides (Tr. 541, Exs. 9, 20, 21, 43).

Icing of all refrigerator cars dispatched from appellant's freight yard is handled by the Addison-Miller Company as an independent contractor under an agreement executed in 1936 (Ex. 42, Tr. 674). Addison-Miller Company manufactures ice at the ice plant (Tr. 59). From there it is conveyed in 400 pound blocks on a conveyor belt running through the underground tunnel to the icing dock, then up through the icing dock to the icing platform (Tr. 67, 68, 116, 122, 709, Exs. 2, 3). During icing operations these blocks of ice are removed from the conveyor belt on top the icing platform, broken up, placed in the refrigerator cars on tracks 12 and 13 and then are salted down (Tr. 122, 124, 272).

Immediately below the conveyor belt where it enters the icing dock is a large slush pit or sump in which is collected slush and cracked ice falling from the conveyor belt as it starts upward to the icing platform (Ex. 5). When the slush pit is cleaned out the slush ice is carried in buckets across track 13 to the north to "a common dumping ground" between tracks 13 and 14 (Tr. 201, 202, 714, 715, 547, 788, Exs. 11

and 12). The slush pit was usually cleaned out during the Addison-Miller day shift but had been cleaned out at night on 2 or 3 prior occasions (Tr. 705, 706). For at least 10 years it had been the accepted practice of Addison-Miller employees to dump this slush ice, salt sacks and other debris on the dumping ground north of track 13 (Tr. 714, 715, 744, 745). Although appellant's employees could not recall having seen slush ice, salt sacks or other debris on the dumping ground over this 10 year period (Tr. 789, 790, 547, 548), it is admitted that the presence of this material on the dumping ground could only mean that it was carried there across track 13 by Addison-Miller employees (Tr. 790).

Appellant had a direct and vital interest in the icing operations of Addison-Miller Company (Tr. 539, 540). Assistant ice foremen employed by the Northern Pacific were usually present on the icing dock during icing operations, exercising some degree of control and supervision over the icing operations of Addison-Miller (Tr. 539, 589, 590, 610).

Salt required in the icing operations was delivered by appellant in freight cars to a point on track 13 opposite the salt pit on the north side of the icing dock (Tr. 163, 165, Ex. 16). The 80 pound paper salt sacks (Tr. 321) were unloaded by Addison-Miller employees from the salt cars by means of a 2-wheel hand truck across a platform extending from the floor of

the freight car to the floor of the salt pit (Tr. 163, 165, 321).

Addison-Miller Company ran three shifts in its icing operations (Tr. 107, 108). During the summer many of the Addison-Miller employees were young high school boys (Tr. 173, 306, 666, 712). An arrangement existed as between Northern Pacific and Addison-Miller officials that a blue light would be exhibited at the west end of the icing dock when work was in progress during hours of darkness (Tr. 410, 766). The minor plaintiff and other Addison-Miller employees were never advised of this arrangement (Tr. 745, 200, 246, 338). To the knowledge of L. W. Phophet, switching foreman of the appellant, this blue light rule or arrangement was often disregarded by Addison-Miller foremen (Tr. 426, 427). Northern Pacific employees had been instructed that when there was any likelihood that men were working on or about cars at the icing dock, the blue light rule or arrangement should not be depended upon to give the men the protection (Tr. 824, 825). Prophet had frequently seen Addison-Miller employees working at night "on the Addison-Miller dock, on top of cars, on tracks 12 and 13 beside the dock, without the blue light illuminated" (Tr. 396).

A sure indication as to whether Addison-Miller employees were working on or about the icing dock and tracks 12 and 13 during hours of darkness was the illumination of the overhead lights on the icing plat-

form. Prophet, switching foreman, James Crump, yardmaster, and Ralph Swanson, ice foreman of appellant, all frankly admitted that the overhead white lights on the icing platform were provided for Addison-Miller employees to work by at night (Tr. 392, 769) and that when the white lights were illuminated at night such indicated in all probability (Tr. 394, 395) and almost to a certainty (Tr. 418, 419) that Addison-Miller employees were working on and around the icing dock (Tr. 697, 790-792).

Appellee Gerald Stintzi, 17 years of age, had been employed by Addison-Miller Company five days prior to July 17, 1952 (Tr. 105, 107). He had worked for Addison-Miller three weeks during the previous summer when but 16 years of age (Tr. 173). During the five days prior to July 17, 1952, Stintzi had worked the swing shift from 3 p.m. to 11 p.m. icing refrigerator cars and unloading salt from the salt cars to the salt pit (Tr. 106, 108). On July 17, 1952, Stintzi reported for work at the icing dock at 3 p.m. (Tr. 108, 180, 272). At 4 p.m. on July 17, 1952, a fruit train composed of 55 refrigerator cars was spotted on tracks 12 and 13 for icing by the Addison-Miller crew (Tr. 771). The icing of this train was completed around 6 p.m. and the train left the yards at 7 p.m. (Tr. 772). A refrigerator train for icing was due in the yard at 9:35 p.m. (Tr. 594) and another fruit train was due at 11:30 p.m. (Tr. 793). Appellee's yardmaster, Crump, knew that after the first fruit

train departed at 7 p.m. it was necessary for the Addison-Miller employees to get the icing dock prepared to service the trains arriving after 7 p.m. (Tr. 795, 799).

Some time around 7 p.m. Stintzi, Allen Maine and Ray Davis, left the premises for supper (Tr. 180, 182, 210, 212, 236, 272). On their return to the icing platform they were advised that ice had become caked up and trouble had occurred in the conveyor belt near the slush pit or sump (Tr. 186,, 709). The Addison-Miller foreman, Fincher, directed Stintzi and a crew of three consisting of Allen Maine, Joe Vallorano and John Tarnaski (Tr. 112, 113, 213, 236, 274) to clean out the ice slush from under the pulley belts in the conveyor chain, remove the slush ice from the slush pit, take it across track 13 and dump it on the common dumping ground (Tr. 112, 114, 131, 132, 193, 212, 213, 264, 274, 275). Another part of the crew was instructed to unload salt from a salt car then spotted in a line of cars on track 13 opposite the salt pit (Tr. 125, 160, 215, 222, 317, 318).

Stintzi, Maine, Vallorano and Tarnaski proceeded down to the slush pit (Tr. 186, 213). Tarnaski and Vallorano worked in the pit filling a large bucket with slush weighing 25 to 40 pounds (Tr. 114, 214, 276) which was then passed to Stintzi and Maine (Tr. 113, 275) who carried it up the stairs leading east from the slush pit (Tr. 114, Ex. 4) and then out the doorway on the north side of the icing dock im-

mediately adjacent to track 13 (Tr. 114, 276, Exs. 7, 16). Track 13 was then occupied by a string of freight cars. The cars extended to the west as far as the eye could see (Tr. 124, 125, 132, 276). To the east were a number of cars including the salt car then being unloaded into the salt pit (Tr. 125, 126, 132, 189, 761). The usual platform extended from the floor of the salt car to the floor of the salt pit (Tr. 190, 192, 268, 298).

Young Stintzi and Maine decided that in order to dump the slush across track 13 as directed, it was necessary to go between the coupling of 2 freight cars immediately to the west of the doorway to the icing dock and slush pit (Tr. 115, 215, 217, 277). That such determination was a reasonably prudent one under the circumstances is indicated by the following facts:

(a) Stintzi and Maine, 16 and 17 years of age, had been expressly directed by their foreman, an adult of 26 years experience on the icing dock (Tr. 699), to dump the slush ice on the dumping ground north of track 13 (Tr. 112, 114, 213, 702, 714). The foreman, Fincher, knew there was a string of cars on track 13 (Tr. 722);

(b) Stintzi and Maine had been instructed not to dump ice (Tr. 242) and not to walk underneath the dock because of the danger of falling ice (Tr. 257, 258);

(c) To the west the cars on track 13 extended as far as the eye could then see (Tr. 124, 125, 132, 276). To the east the platform between the salt car and salt

pit was an effective barrier (Tr. 124, 125, 132, 190, 192, 215, 216, 241, 268, 277);

(d) The fact that salt was being unloaded from a salt car was insurance that the cars on track 13 would not be moved (Tr. 159, 160, 296). Even appellant's assistant yardmaster admitted that when salt cars were being unloaded, all foremen were notified, and every precaution was taken that cars on track 13 would not be disturbed and the men would be protected (Tr. 624);

(e) Stintzi, Maine and the others had never seen cars floated in on either tracks 12 or 13 when work was in progress on and about the icing dock and had no reason to anticipate that such would be done (Tr. 197, 198, 223, 245, 282, 296, 338, 340).

In the slush dumping operation Stintzi would proceed beneath a coupling between cars to the north side of track 13. Maine would then pass the bucket under the coupling to Stintzi who dumped the ice north of track 13 and then passed the empty bucket back to Maine. Stintzi would then return under the coupling to the south side of the track (Tr. 127, 244). On several occasions Vallorano took Stintzi's place and proceeded under the coupling in the same manner (Tr. 239, 240, 275, 277).

During the time this operation was in progress, the white overhead lights on the icing platform were illuminated (Tr. 226, 278, 283, 309, 337, 338, 601, 725, 726), as a certain indication to Northern Pacific per-

sonnel that Addison-Miller employees were working on and around the icing dock and tracks 12 and 13 (Tr. 394, 396, 418, 419). At approximately 8:20 p.m. after carrying slush ice in this fashion for from one-half to one hour (Tr. 278), Stintzi was passing the empty bucket from the north side of the coupling to Maine on the south when the standing cars were suddenly and violently set in motion (Tr. 132, 133, 219). Stintzi was thrown beneath the wheels, dragged along the track, and sustained the serious injuries for which recovery was awarded in this action (Tr. 130-134, 221, 222, 278-281). Young Maine was also struck but succeeded in grabbing and holding on to a ladder on the rear of the freight car to the east as he was dragged down the track, and so avoided serious injury (Tr. 219-222).

The standing cars were struck from the west by a string of 14 empty and unattended freight cars which had been disengaged from a switch engine in front of the yard office some 2050 feet west of the icing dock and which had drifted into and along track 13 at a speed of 3 to 4 miles per hour (Tr. 386, 387). Approximately 8 minutes were required for the cars to travel that distance (Tr. 806, 807). This switching operation was directly supervised by appellant's switch foreman, L. W. Prophet, who worked under the orders of James Crump, yardmaster (Tr. 375, 379). At the time the cars were disengaged in front of the yard office and permitted to drift unattended down track

13, yardmaster Crump had actual knowledge that Addison-Miller employees were working on and around the icing dock (Tr. 796, 797) but did not take that fact into consideration (Tr. 799).

Although foreman Prophet disclaimed actual knowledge as to whether any of the standing cars on track 13 were or were not then being loaded or unloaded (Tr. 422) the illumination of the overhead lights on the icing platform was admittedly a definite and certain indication that Addison-Miller employees were working on and about the dock, the cars and track 13 (Tr. 394, 396, 418, 419), but Prophet could not recall whether he took that fact into consideration (Tr. 403, 404). Absolutely no precaution was taken by any Northern Pacific employee to advise Addison-Miller employees that unattended cars were drifting along track 13 approaching the icing dock around which those employees were then engaged in the performance of their duties (Tr. 397, 402).

A loud speaker system and a telephone communication system were in operation between the yard office and the icing dock and had previously been used to advise Addison-Miller employees of the movement of cars (Tr. 397-402). On the occasion in question neither system was so used (Tr. 402) although such advice could have been given in a matter of seconds (Tr. 788).

On this evidence, the District Judge properly held that issues of fact as to the status of appellee, as to

appellant's primary negligence and as to appellee's contributory negligence were presented for determination of the jury (Tr. 504-508) and all issues were so determined in favor of appellee.

ARGUMENT

Answer to Specifications of Error I, II & III.

Any citation of authority is unnecessary for the elementary propositions that the weight and credibility of the testimony are for the jury, that conflicts in evidence should be resolved in favor of the plaintiff, and that the evidence is to be viewed in its aspects favorable to the plaintiff's case.

Applying the elementary propositions to a case directly presenting the same contentions made by appellant in its first three specifications of error, we note the following language:

> "By the verdict the jury determined against appellant the issues that appellee was an invitee, appellant was negligent and appellee free from negligence proximately contributing to his injury. Ordinarily these are questions of fact for the jury. We are asked to hold as a matter of law that each issue was erroneously determined. To reach such conclusion we must be able to say that no other reasonable inference may be drawn from the facts shown by the evidence. Where there is conflict we consider only such evidence and reasonable inference thereon as tend to sustain the verdict."

Silvestro v. Walz, 51 N.E. 2d 629 (Indiana).

Examination of appellee's Restatement of the Case, viewed in the light and scope of this Court's appellate power of review as to these questions, requires affirmance of the verdict and judgment.

Appellant does not dispute the proposition that the minor, Gerald Stintzi, was an invitee "while he was in the ice dock, or on the platform, or in the tunnel, or in the ice house, or while he was unloading salt from the interior of a box car and across the elevated ramp into the salt room, or while he was working between the elevated platform and the tops of refrigerator cars in *icing operations*" (Brief of Appellant, p. 23; see also pp. 28 and 29 of Appellant's Brief). Appellant, however, contends that, as defined in its Brief, the invitee status of the minor Stintzi was limited to the places on the premises and the operations as described in the quoted portion of the Brief set out above.

As we understand appellant's position, it asserts that any act done by the minor Stintzi, though it might be reasonably contemplated and necessary in the performance of duties required of the invitee, but which exceeded the boundary specified by appellant, would, *ipso facto,* constitute Stintzi a licensee or trespasser. Thus, if the two youngsters, Stintzi and Maine, or either of them, had been injured through some negligent act of the appellant while they were dumping the ice in "a large open area to the west" and contrary to instructions of their foreman Fincher,

they would be licensees despite appellant's alternate suggestions in its Brief that Stintzi should have done so (P. 34 Appellant's Brief). We contend, and shall show, that such is not the law.

The minor Stintzi was, without question, an invittee as defined by the Supreme Court of the State of Washington, and by the conclusive weight of authority, both judicial and text.

Mitchell v. Barton, 126 Wash. 232, 217 Pac. 993;
Holm v. Inv. & Securities Co., 195 Wash. 52;
Grove v. D'Allessandro, 38 Wash. 2d 421, 235 Pac. 2d 826;
Dingman v. A. F. Mattock Co., 15 Cal. 2d 622, 104 Pac. 2d 26;
Leenders v. California Hawaiian etc. Corp., 139 Pac. 2d 987 (California).

> "A test commonly applied in determining the status of a person who goes upon railroad premises as an invitee or licensee is the presence or absence of a mutual interest or advantage to both the visitor and the railroad company in his presence there."

44 Am. Jur., Sec. 426, p. 644.

Also see discussion 44 Am. Jur., Sec. 429, pp. 648-650 incl.

Appellant's authorities cited in its Brief (see pp. 20-36 incl.) are acceptable only as correct statements of the law applicable to the *ad hoc* situations therein presented. As such, the authorities are clearly distinguishable.

Dotson v. Haddock, 146 Wash. Dec. p. 47, 278 Pac.

2d 338, presented a situation where the plaintiff was injured as the result of an accident on the steps while leaving defendant's home. The presence of plaintiff in defendant's home related solely to a moral or spiritual benefit, the parties having assembled at defendant's home as a group of religious people interested in the promotion of certain Christian principles. Plaintiff was not an invitee.

In *McNamara v. Hall,* 38 Wash. 2d 864, 233 Pac. 2d 852, the plaintiff sustained an injury while riding in the home elevator of the defendant and was not therefore by virtue of that and the related facts an invitee.

In *Deffland v. Spokane Cement Co.,* 26 Wash. 2d 891, 176 Pac. 2d 311, the plaintiff's son was killed as the result of attempting to retrieve pigeons from the defendant's premises and the minor was clearly not an invitee, nor did the facts of the case bring it within the "attractive nuisance" doctrine.

In *Garner v. Pacific Coast Coal Co.,* 3 Wash. 2d 143, 100 Pac. 2d 32, the injured plaintiffs were two girls who fell through a pathway on defendant's premises and suffered severe burns to their feet from live coals which were some distance underneath the pathway, and the Court determined that under all the circumstances the injured parties were not invitees.

Christiansen v. Weyehaeuser Timber Co., 16 Wash. 2d 424, 133 Pac. 2d 797, is discussed factually by appellant. Clearly the Court's language and the fact

statement of the appellant distinguish that case. The act of the plaintiff in going to an area completely outside of an easily defined area, within which plaintiff could have been an invitee, and there engaging in an activity of no actual or potential mutual benefit to defendant, stamped plaintiff as a licensee.

Hansen v. Lehigh Valley Ry. Co., 120 F. 2d 498, presents an *ad hoc* situation, as may be clearly seen from the preliminary discussion of the Court in that opinion. Nor is there any similarity between the instant cause and that case which could be characterized within the expression of Scrutton, L. J. set out in the *Lehigh* opinion.

The minor Stintzi, along with another young boy of the age of sixteen, Allan Maine, and Joe Vallorano and John Tarnaski, were ordered to clean out the slush ice from under the pulley belts in the conveyor chain, which was the only medium that Addison-Miller had to bring the ice from the ice house along the lower level, and up onto the ice dock for the required purpose of icing the refrigerator cars of the appellant railroad. Stintzi and the other men had been so directed by the foreman for Addison-Miller, Robert C. Fincher, because the ice was becoming caked up and trouble had occurred in the conveyor belt (Tr. 186, 709). That the efficient, uninterrupted use of the conveyor belt was necessary, requires no argument in view of the appellant's concession that it had a direct and vital interest in the icing operations of Addison-

Miller (Tr. 539-540). It follows that if the ice must be cleaned out from the sump pit and from around the conveyor chain, it must likewise be removed. The proper functioning of all machinery in Addison-Miller's operation was an indispensible requirement of operation—as much so as the freezing process in the ice house, the distribution on the ice dock, the unloading of salt, the conveying of salt from the ground level to the ice dock by the gig, the placing of ice in the cars, the salting of the ice, the checking by the appellant of the refrigerator cars which were to be iced, and were iced, the provision for disposition of unused materials and the like.

Certainly no one would dispute the fact that in the mining industry many necessary operations are required for the efficient conduct of the whole. Equipment of varied types, including bits, trains and cars, etc. are required; various classified types of employees are needed in different operations, such as the hoist man, the driller, the timber man, the powder man, the mucker, etc., and likewise in the steel mill there is the required transportation of scrap to the scrap yard; the process of mixing scrap with other crude ores and with carbon; the heating and smelting process; the pouring and moulding process for ingot production, the rolling sheds for the fabrication of all types of steel—flat, angle and corrugated, and the disposal of waste. Plainly, all phases of an operation are important to its general over-all function. Cer-

tainly it can be said that all of the operational phases of Addison-Miller, including ice removal from the conveyor belt, are reasonably embraced within the expected and necessary duties of its employees.

Foreman Robert C. Fincher, an experienced supervisor, directed the minor Stintzi, along with others, to perform an operation which he, as foreman, had authority to direct. Mr. Fincher had been the foreman of the ice dock for Addison-Miller for ten years. He had worked for Addison-Miller on the ice dock prior to the date of the accident for a period of twenty-six years. He told Stintzi where to dispose of the slush ice, and he directed him to take it across Track 13 and dump it (Tr. 714). According to Mr. Fincher, slush ice had been dumped in the same place for twenty-six years (Tr. 744).

"Q. How long have you dumped slush ice over there?

A. Ever since I have been there.

Q. Ever since you have been there?

A. Yes.

Q. Taken the slush ice over and dumped it in the same place, is that correct?

A. Yes, sir.

Q. And that is what you instructed these two boys to do?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir." (Tr. pps. 744 and 745)

And certainly other refuse and trash and papers and salt sacks had been dumped in the same place for ten years, or longer (Tr. 714, 715; Statement of Case).

Appellant in its Brief, labors to create the impression that slush ice had been dumped north of Track 13 on only two or three previous occasions. The fact of the matter is that slush ice had been dumped a great number of times, but mostly on the daylight shift. Mr. Fincher, himself, according to his testimony, had only cleaned and dumped slush ice approximately three times (Tr. 705).

The conclusive and ultimate proof that appellant recognized the area north of Track 13 as a common dumping ground for Addison-Miller in its ice operation is implicit in the direct testimony of Mr. Fincher while under examination by appellant's own counsel: (Tr. 703)

> "Q. And what did you tell them?
> A. I told them not to go through them cars, to go around the end of the cars.
> Q. How many cars were on Track 13?
> A. I think they would have to go around about two and a half. I don't think the third car was quite even with where they came out with the slush.
> Q. You mean—
> A. It might have been.
> Q. —to go to the east two and a half cars?
> A. Two and a half car lengths, possibly three."

The evidence wholly preponderates, by virtue of the above, for the proposition that Stintzi was an invitee when using the common dumping ground, and that appellant fully recognized the use of that common dumping ground as being reasonably embraced within the area for the performance of the duties of

the Addison-Miller employees. The admissions of responsible officials for appellant railroad indicate that it recognized that the area north of Track 13 was a common dumping ground in the sense which the law understands that phrase. These officials knew that the use of the area by Addison-Miller was contemplated by the contracting parties and was reasonably embraced within the work area of Addison-Miller employees (Tr. 547, 788, 789). Consequently, it seems clearly definite that Stintzi, when dumping the ice bucket north of Track 13, was acting as a result of implied invitation, if, in fact, he was not there by direct invitation in accord with the circumstances and the operation of the law applicable.

Implied invitation arising from the facts in this case has judicial approval in the State of Washington. In *Great Northern v. Thompson,* 199 F. 395, 9th Circuit, the Court considered the following facts: A crossing was habitually used by people in Leavenworth, Washington, in going to and fro, and this use had continued for a number of years. Some time prior to the accident involved the company has posted "no trespass" signs in the area. At 10:45 on a dark night, the plaintiff, while crossing in the usual place, was struck by a caboose which had been floated down the track unattended by defendant railway company. We quote the Court:

> "The question of contributory negligence is a question of fact, to be passed upon by the jury whenever the undisputed facts are such that dif-

ferent minds might reasonably come to different conclusions as to the reasonableness and care of the injured party's conduct. If the evidence is such as to leave the mind in a state of doubt on the subject, the case should not be withdrawn from the jury. These principles are so well established as to require the citation of no authority. It may be added that the question whether or not the person injured is guilty of contributory negligence may often depend upon a variety of considerations. The question is not always answerable by pointing to the fact that the injured party might have used a safe way. Whether a reasonably prudent person would have taken the safe way may depend upon the conditions and the circumstances, the accessibility and the proximity of the safe way, the difficulties and obstructions to the use of the safe way, the extent of the public travel on the chosen way, the frequency of the passage of trains over it, and alertness in looking out for passing trains. There was evidence tending to show that there was not a perfectly safe and equally convenient path at the side of the track; that, while there was a pathway between the track and the ravine, it was a very rough pathway, made of loose cinders, which were being dumped on it at that time; and that at places the width of the path between the track and the gulch was very narrow, and that at one place it was obstructed by a pile of timbers. . . ."

The Court's decision in this case and its reasoning is in harmony with the Supreme Court of the State of Washington.

In *Imler v. Northern Pacific Ry. Co.,* 89 Wash. 527, 154 Pac. 1086, the appellant relied upon the rule announced in *Great Northern v. Thompson, supra,* as

follows:

> "We take it to be well settled that railroad companies are charged with the duty of exercising ordinary care to discover the presence of persons on their tracks, and to avoid injuring them at those places where, under all the circumstances, they are reasonably chargeable with knowledge that such persons are liable to be; and in our judgment it can make no difference so far as the duty of the railroad is concerned, whether such persons are technically to be classed as trespassers, licensees, or persons using the company's tracks as of right. In all such cases the duty is imposed because of the broad rule of humanity that one engaged in so dangerous a business is required to exercise ordinary care to avoid injuring another, when the presence of and danger to such other person is reasonably to be anticipated."

The Court in *Imler* distinguished the facts and law applicable there, but had this to say about *Great Northern v. Thompson, supra*:

> "Recoveries are allowed in such case because a higher duty rests upon a railroad company under such circumstances. In moving trains over and across the streets of cities, or through depot grounds or in switch yards, the railroad company, from the nature of things, must have its trains under control and be constantly alert to the possibility of injuring persons or property. . . .
>
> "The crossing cases may be further distinguished. They rest in implied license upon legal grounds as differentiated from the acts or conduct of the parties as they may arise in a particular case. In consequence, a duty is put upon the court in all such cases to measure the relative rights as well as the relative obligations of the parties to the action. The company is held to

a rule of strict accountability, because it is necessary for men and traffic to cross railway tracks in the pursuit of their legitimate undertakings and conveniences. The law charges a company with a knowledge that they will do so. Whereas, one who walks along a railroad track using it as a footpath, especially where the track is in the country and fenced, cannot claim the protection given to those who do things of necessity, for, from the very nature of things, he is using the track for his personal comfort and convenience. Men must, and therefore may, move from one side of a track to another at places established by the company, or so long used by the public as to imply a license, resting under the assumption of legal right. . . . The cases all rest in the same sound principle which controls every exploration into the law of negligence—that is, that the degree of care in every case shall be measured, not by any abstract rule, but by reference to the facts and circumstances attending the particular case."

The same reasoning has been applied in text analysis of *Great Northern v. Thompson, supra,* in 44 Am. Jur., Sec. 438, page 633, where the pertinent text material is the latter part of the quoted statement.

"An implied invitation to use railroad tracks as a footpath has been held not to arise from acquiescence in such use where a sign is conspicuously posted warning persons not to do so. A railroad company is said to have performed its duty with respect to warning pedestrians off its track between stations and crossings when it maintains along the track fences and guards and notices forbidding trespassing upon the property. There are, however, decisions to the effect that a railroad company which has permitted the use of its tracks by pedestrians between two points can-

> not relieve itself from the obligation to use reasonable care in handling its trains there by merely posting 'no trespass' signs along the tracks, if they have been so generally disregarded as to raise a presumption of acquiescence on the part of the railroad company."

Without concession to appellant's contentions, we suggest that it is highly important to note that this accident occurred within the so-called permissible boundaries of operations specified by appellant in its Brief. We concede, of course, that the accident did not happen on the top of a refrigerator car, or in a salt car, or in the passageway between the salt car and the salt shed, but on the ground area directly underneath what would be the north top level of a freight car standing on Track 13. True, the dumping ground where Stintzi was carrying the ice was approximately five to six feet, or one or two quick steps, north of the point where the accident occurred (Tr. 127). In any event the distance to the dumping ground from the exit of the ice house was probably no more than fifteen feet. These facts establish conclusively that it is almost an absurdity to restrict the invitation to Stintzi as proposed by appellant. Appellant's statement that it was not interested in the continuous operation of the chain which supplied ice for the icing of its cars is completely contradicted by the assertion of the mutual interest of appellant in the icing operation, as testified to by its officials.

In *Chicago I. & L. R. Co. v. Pritchard,* 168 Ind.

398, 79 N.E. 508, an employee of a shipper loading poles on a railroad car went around the end of the car for some purpose which the evidence did not directly disclose, and as a result was struck by a train approaching the area. The employee, it appeared, was not directly engaged in the loading or unloading of the poles in the area in which he was injured. The Court, in speaking of the situation, said as follows:

> "It is true that the evidence does not directly disclose why he went to the east side of the car, but it must be remembered that he was a servant, and that obedience is due from such a one. The call to stop the train, wherever it came from, naturally suggested that the danger might have something to do with the car which appellant was helping to load for his master. While it may be that decedent went where he did out of a prompting which was not unmixed with curiosity, yet it is difficult in view of the circumstances, to resist the conclusion that he was moved by his plain duty to be on hand should the emergency, whatever it was, require. We are of opinion that, in the free logic which we have had occasion to observe that a jury may exercise (*McCarty v. State*, 162 Ind. 218, 70 N.E. 131), it was competent for the jury to conclude that decedent was moved to go where he did, in part at least, out of a prompting of duty."

The question of implied invitation and the extent of the appellant's invitation to Stintzi are clearly fact questions in this case that were properly submitted to the jury. The question as to the extent of an invitation is usually one for the jury and not for the Court. The rule is particularly applicable here

because the great weight of authority supports the proposition that the invitation extends to those parts of the premises, where the invitee under circumstances and conditions of his invitation, would naturally be likely to go; or such premises as would reasonably be embraced within the object of the invitee's visit.

44 Am. Jur. 663;
Grove v. D'Allessandro, 38 Wash. 2d 421, 235 Pac. 2d 826;
Boucher v. American Bridge Co., 213 Pac. 2d 537 (California);
Biondini v. American Ship Corp., 185 Pac. 2d 94 (California);
Gastine v. Ewing, 150 Pac. 2d 266 (California);
Morris v. Granato, et al, 133 Conn. 295, 50 A. 2d 416;
Silvestro v. Walz, 51 N.E. 2d 629 (Indiana);
Pauckner v. Wakem, 83 N.E. 202 (Illinois);
Ellington v. Ricks, 178 N.C. 686, 102 S.E. 510;
Franey v. Union Stockyards & Transit Co., 235 Ill. 522, 85 N.E. 750.

The foregoing authority establishes a standard for the jury's determination. That the jury correctly and properly found Stintzi to be an invitee in accord with the recognized legal standard is conclusively established by the following pertinent facts:

(a) Stintzi and Maine, 16 and 17 years of age, had been expressly directed by their foreman, an adult of 26 years experience on the icing dock (Tr. 699) to dump the slush ice on the dumping ground north of

Track 13 (Tr. 112, 114, 213, 702, 714). The foreman, Fincher, knew there was a string of cars on Track 13 (Tr. 722);

(b) Stintzi and Maine had been instructed not to dump ice (Tr. 242) and not to walk underneath the dock because of the danger of falling ice (Tr. 257, 258);

(c) To the west the cars on Track 13 extended as far as the eye could then see (Tr. 124, 125, 132, 276). To the east the platform between the salt car and salt pit was an effective barrier (Tr. 124, 125, 132, 190, 192, 215, 216, 241, 268, 277);

(d) The fact that salt was being unloaded from a salt car was insurance that the cars on Track 13 would not be moved (Tr. 159, 160, 296). Even appellant's assistant yardmaster admitted that when salt cars were being unloaded, all foremen were notified, and every precaution was taken that cars on Track 13 would not be disturbed and the men would be protected (Tr. 624);

(e) Stintzi, Maine and the others had never seen cars floated in on either Tracks 12 or 13 when work was in progress on and about the icing dock and had no reason to anticipate that such would be done (Tr. 197, 198, 223, 245, 282, 296, 338, 340).

(f) The Northern Pacific had a direct and vital interest in all the icing operations of Addison-Miller (Tr. 539, 540) including the dumping of slush ice necessary to keep the conveyor belt in operation (Tr.

186, 709). For at least 10 to 26 years this slush ice had been dumped north of Track 13 on the common dumping ground (Tr. 714, 715; 744, 745). In the face of this undisputed fact it will not suffice for appellant's employees to now fail to recall previous knowledge of it (Tr. 548, 547, 789, 790). This continuous usage of itself establishes appellant's acquiescence in it. Even as stated by appellant (Appellant's Brief p. 25):

> "An invitation . . . may be *implied* when such owner or occupier by acts or conduct leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared and allowed to be used."

Appellant was guilty of negligence. The duty of defendant railroad has been recited heretofore (*Great Northern v. Thompson, supra*), and the rule in that case is amply suppoted by authority.

> *Spots v. Wabash West. Ry. Co.,* 20 S.W. 190 (Missouri);
> *Chicago & Erie Ry. Co. v. Shaw,* 116 F. 621;
> *Neal v. Curtis & Co. Mfg. Co., et al,* 41 S.W. 2d 543.

The cases cited by appellant (pp. 37-38 Appellant's Brief) are meaningless. The question involved here is whether the defendant knew, or should have known, that the plaintiff was working in the particular area around the cars, and if it did know of this fact, or

should have known of it (it admittedly did know—Tr. 796, 797; 394, 396; 418, 419) it was chargeable with negligence in sending fourteen cars unattended into a collision with the standing cars. None of appellant's cases have the factual counterpart in the instant cause. Nor did appellant have any absolute right, as it contends, to rely upon blue lights being displayed so as to exonerate it from liability.

In *Louisville & N. R. Co. v. Payne's Admr.*, 197 S. W. 928 (Kentucky), it was said:

> "It is further insisted that the company did not owe decedent any duty because of his failure to apprise its employees of his presence under or between the cars by means of a blue flag, as required by the company's rules. There may be cases where no duty arises until the employee places the warning signal, but these are cases where the company is under no obligation to anticipate the presence of such employee. *Kentucky & Tennessee Ry. Co. v. Minton,* 167 Ky. 516, 180 S.W. 831. We are not prepared, however, to hold that in every instance the railroad company has discharged its full duty to its car inspectors and repairers whose work is of a peculiarly hazardous character by merely promulgating a rule requiring them to protect themselves by placing a certain flag. In yards like those at Lebanon Junction, where many men are employed, and several trains come and go each day, and a great deal of switching is done, and numerous cars must necessarily be inspected and repaired by men who frequently go under and between the cars for but a short period of time, we conclude that the company is under the humane duty to anticipate the presence of such employees under or between the

cars and to take such precautions for their safety as a proper lookout and timely warning of approaching cars will afford; and this duty is owing, whether the injured employee protects himself by means of a blue flag or not, and particularly so where, as in this case, there was substantial evidence that the rule requiring such action on his part was habitually disregarded with the acquiescence of those employees of the company superior in authority to the injured employee. *C.N.O. & T.P. Ry. Co. v. Lovell's Admr.,* 141 Ky. 249, 132 S.W. 569, 47 L.R.A. (N.S.) 909; *L. & N. Ry. Co. v. Johnson's Admr.,* 161 Ky. 824, 171 S. W. 847; *Norfolk & Western Ry. Co. v. Short's Admr.,* 171 Ky. 647, 188 S.W. 786.

"But it is suggested that decedent assumed the risk of injury because of his failure to put out a blue flag, and is therefore not entitled to recover. Of course, it might be said that decedent's failure to put out a blue flag was the sole cause of his injuries, if the company owed him no lookout or warning duty in the absence of the flag, and the rule requiring him to protect himself in that manner had not been habitually disregarded with the acquiescence of the company. In view, however, of our conclusion that the company owed him a lookout and warning duty, notwithstanding his failure to observe the rule, it is clear that such failure cannot be regarded as the sole cause of his death, but might constitute contributory negligence going to the dimunition of damages. . . ."

Likewise in *Southern Ry. Co. v. Wilkins,* 178 N.E. 454 (Indiana), is was said:

"There appears to have been introduced in evidence a rule of the operating department of the Southern Railway system in the following words:

" 'A blue signal displayed at one or both ends of an engine, car or train indicates that workmen

> are under or about it, when thus protected it must not be coupled to or moved. Workmen will place the blue signals and the same workmen are alone authorized to remove them. Other cars must not be placed upon the same track so as to intercept the view of the blue signals, without first notifying the workmen.'
>
> "This rule appears to prohibit the running of cars upon a track where a blue flag is placed, but it does not exempt the railroad company from exercising due care when there is no blue flag and it is a question for the jury to determine that fact, and the evidence adduced above is sufficient . . ."

Of course, even if the fact of some negligence on the part of Addison-Miller was conceded, it could not be imputed to Stintzi. If appellant was guilty of negligence which was the, or a proximate cause, then appellant is legally responsible.

In *The Joseph B. Thomas,* 86 F. 658 (9th Circuit), we find the following:

> "The mere fact that another person concurs or co-operates in producing the injury, or contributes thereto, *in any degree, whether large or small, is of no importance.* . . . It is immaterial how many others have been in fault, if the defendant's act was an efficient cause of the injury." (underscoring supplied)
>
> "It is no defense, in an action for a negligent injury, that the negligence of the third person, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause of the injury. In such cases the fact that some other cause operates with the negligence of the defendant in producing the injury

does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in the production of the injury, he is liable to respond in damages, whether the other cause was guilty or an innocent one."

ANSWER TO

SPECIFICATIONS OF ERROR IV AND V

Appellant assigns error on the admission in the evidence of Rule 805 of the Consolidated Code of Operating Rules and General Instructions (Tr. 799-801) and upon the Court's instruction referring thereto (Tr. 885-886).

Appellant's basic defense was that in shunting the unattended cars on to track 13 the Northern Pacific personnel was relying upon the blue light rule and upon the absence of a blue light at the west end of the icing dock (Tr. 97, 101). Appelant's foreman, Prophet, and yardmaster, Crump, testified that they had in mind only the blue light rule when these unattended cars were disengaged (Tr. 395, 403, 410, 419, 765, 766, 786, 787, 799, 822-825). In view of this testimony it was most proper to inquire as to whether Crump and Prophet had also in mind Rule 805 (Tr. 419-421, 799-800, 814-816). Rule 805 was admittedly applicable to the situation here presented (Tr. 815-816, 419-421, Apps. Br. 45).

"The question of the admission in evidence of rules of the defendant carrier, governing the operation of

its trains or cars, and issued to its employees, when such rules had been offered by the plaintiff, has been passed upon in many jurisdictions, and, almost without exception, the courts have held such to be proper evidence, although not conclusive of negligence * * *. The prevailing ground, however, upon which such evidence is admitted is that these rules to employees indicate the necessity of care under the particular circumstances covered by the rules, and are in the nature of an admission by the railroad that due care, under the circumstances, required the course of conduct required by the rule * * *. Such evidence has been generally held admissible in cases of injuries to third persons, as well as to passengers." *Canham v. R. I. Co.,* 85 Atl. 1050, 1055.

See also: *Stevens v. Boston Elevated,* 69 N.E. 338; *Hurley v. Connecticut Co.,* 172 Atl. 86; *Deister v. Atchison T. & S.F. Ry. Co.,* 162 P. 282; *Palmer v. Long Beach,* 189 P. 2d 62; *Callaway v. Pickard,* 23 S.E. 2d 564; 2 *Wigmore, Evidence,* 3d Ed. Sec. 282.

Failure of the appellant to give any warning of the impending approach of the unattended cars having been alleged (Tr. 16, 26), it was not necessary to plead Rule 805 to make examination thereon proper or to make the rule admissible in evidence. *Callaway v. Pickard,* 23 S.E. 2d 564, 574; *Pollard v. Roberson,* 6 S.E. 2d 203.

Appellant complains that the trial court's instruction (Tr. 885, 886) made appellant an absolute insurer

of Stintzi's safety. Such conclusion is unwarranted. The jury was directly instructed that "the defendant is not the insurer of the safety of Gerald Stintzi" (Tr. 877) and was many times instructed that liability could only be predicated upon a finding of negligence which was a proximate cause of the injuries alleged (Tr. 870-893). The instruction complained of merely advised the jury that regardless of the blue light rule or arrangement relied upon by appellant, if the appellant "had any reason to anticipate that persons might lawfully be employed in, on, under or about standing cars, it was under a duty reasonably to warn such persons of any movement of the cars which might endanger them" (Tr. 885, 886). No exceptions were taken to similar instructions advising the jury to the same effect (Tr. 881, 882, 887).

ANSWER TO

SPECIFICATION OF ERROR VI

Appellant complains that the instruction referred to (Tr. 886-887) authorizes recovery upon a finding of slight negligence which was less than a material or proximate cause of the injury alleged. When considered in the light of the instructions as a whole the instruction referred to is not subject to the construction placed upon it by appellant.

The jury was advised that the action was based on a charge of negligence, and negligence was properly defined with instruction that negligence is never pre-

sumed but must be established by a preponderance of the evidence (Tr. 876-877). The jury was specifically instructed that:

> "* * * in order to find the defendant railway company negligent in this case, you *must* find from the preponderance of the evidence, that when the defendant, through its agents and employees, shunted freight cars onto Track 13 and caused them to drift into and against the freight cars between which Gerald Stintzi was located, the defendant, through its agents and employees, know or should have known, in the exercise of reasonable care, that employees of Addison-Miller Company were engaged in work of such nature that they would be endangered by the movement of the cars. If you should find that the railway company, through its agents and employees, knew or should have known at the time that Addison-Miller employees were engaged in work which would cause them to be endangered by the movement of the cars, then the defendant was negligent, and if you further find that such negligence was a proximate cause of the injuries to Gerald Stintzi, and that Gerald Stintzi himself was not guilty of contributory negligence, your verdict should be for the plaintiff.
>
> "On the other hand, if you should find that the defendant railway company, through its agents and employees, at the time it shunted the cars into and against the cars on Track 13 between which Gerald Stintzi was located had no knowledge or reasonable cause to believe that the employees of Addison-Miller Company were so engaged as to be endangered by the movement of the cars, then the Northern Pacific Railway Company was not negligent in moving the cars and your verdict should be for the defendant." (Ital-

ics ours) (Tr. 881-882).

Even though a detached statement in instructions may be subject to technical criticism, all of the instructions must be considered together, and if, as a whole, they fairly state the law, no prejudicial error may be claimed. *Lee and Eastes v. Continental Carriers,* 44 Wn. 2d 28, 265 P. 2d 257; *Robbins v. Greene,* 43 Wn. 2d 315, 261 P. 2d 83; *Myers v. West Coast Fast Freight,* 42 Wn. 2d 524, 256 P. 2d 840.

An almost identical criticism to a detached statement in instructions was made in the case of *Davis v. Falconer,* 159 Wn. 230, 292 P. 424, wherein, in disposing of such criticism, the Court stated:

> "In the instructions given subsequent to Nos. 7 and 8, the jury were specifically told that, if they found certain facts, the verdict should be in favor of the respondent, and that if they found certain other facts, the verdict should be for the appellants. The instructions, when they are read in their entirety, are clear and explicit, and the jury could not possibly have been misled by the use of the expression 'any negligence,' as it appears in instructions Nos. 7 and 8. * * *"

ANSWER TO

SPECIFICATION OF ERROR VII

Appellant assigns error on refusal to give that portion of appellant's requested instruction No. 3 (Tr. 34-36) to the effect that "it is the law that one having a choice between methods of doing an act which are equally available and who chooses the most dan-

gerous of the methods is ordinarily deemed negligent, and the fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly going into a position of danger." The balance of appellant's requested instruction No. 3 was given verbatim by the District Judge (Tr. 882-883).

As applied to the facts of this case, the omitted portion of instruction No. 3 is not a proper statement of law. To instruct the jury that the failure of Stintzi to take a route, which now in retrospect, may appear to have been safer, constituted negligence on his part as a matter of law, would have been error. The determination of contributory negligence in this case depended upon many and various facts and circumstances. The instruction as worded would have removed from the jury's consideration the facts that at the time Stintzi, Maine and Vallorano determined to go across track 13 between cars in order to dump the slush ice as they had been directed, there were cars extending to the west of the icing dock as far as one could see (Tr. 124, 125, 132, 276); that the platform between the salt car and salt pit to the east prevented passage in that direction (Tr. 124, 125, 132, 190-192, 215, 216, 268, 277); that they had never seen freight cars floated in on track 13 when work was in progress (Tr. 197, 198, 223, 245, 282, 296, 338, 340); the fact that they had been instructed not to dump slush ice under the dock (Tr. 242) and had been instructed not

to walk beside or under the dock because of the danger of falling ice (Tr. 257-258); and the fact that work was in progress in and between the salt car on track 13 and the salt pit (Tr. 125, 126, 132, 189, 761) which meant to them (Tr. 159, 160, 296) and even to appellant's assistant yardmaster, that every precaution would be taken that the cars on track 13 would not be disturbed unless and until proper notification and warning had been given to all concerned (Tr. 624).

In *G. N. Ry. Co. v. Thompson* (Ninth Circuit), 199 Fed. 395, this Court stated:

> "It may be added that the question whether the person injured is guilty of contributory negligence may often depend upon a variety of considerations. The question is not always answerable by pointing to the fact that the injured person might have used a safe way. Whether a reasonably prudent person may have taken the safe way may depend upon the situation and circumstances, the accessibility and proximity of the safe way, the difficulties and obstructions to the use of the safe way * * *."

The question of appellee's contributory negligence in this case under the evidence depended simply upon whether a reasonably prudent person, acting under the same or similar circumstances as the jury found to exist, would have gone between the freight cars in question. On that issue appellant received complete and most favorable instructions from the District Judge (Tr. 882-884), the District Judge even instruc-

ing the jury directly that "even though he (Stintzi) was directed by his superiors to do the very thing that he was doing when injured, he would still be contributorily negligent if you should find that a reasonably prudent person, acting under the same or similar circumstances, would not have gone between the freight cars in question or under the couplings thereof" (Tr. 884).

The refusal to grant requested instructions, even if in proper form, is not error where the subject matter thereof is sufficiently covered by other instructions and where the instructions as a whole adequately cover the issues in the case. *Arnold v. U. S. Gypsum Co.,* 44 Wn. 2d 412, 267 P. 2d 689; *Sevener v. Northwest Tractor and Equipment Corp.,* 41 Wn. 2d 1, 247 P. 2d 237; *Christensen v. Gray's Harbor County,* 34 Wn. 2d 878, 210 P. 2d 693; *Swak v. Department of Labor & Industries,* 40 Wn. 2d 51, 240 P. 2d 560.

The cases cited by appellant (Apps. Br. 50) do not involve the matter of instruction. In *Scharf v. Spokane and Inland Empire Railroad Co.,* 92 Wn. 561, 159 P. 797, it was held that under the facts there presented a naked licensee failing to exercise the highest degree of care for his own safety while walking in the middle of a railroad track instead of on a path provided for that purpose beside the track was negligent as a matter of law. In *Clark v. N. P. Ry.* 29 Wn. 139, 69 P. 636, it was only held that defendant railway company owed no duty to plaintiff, a tres-

passer, who was traversing defendant's switching yard after he had been expressly ordered off the yard.

ANSWER TO
SPECIFICATION OF ERROR VIII

Appellant assigns error upon refusal of the District Judge to give its requested instruction (Tr. 35-36) instructing the jury as a matter of law that if there were no cars being iced nor any salt car on track 13 at the time of Stintzi's injury, the verdict must be for the defendant. The requested instruction was erroneous and properly refused.

The question of appellant's negligence in failing to give Addison-Miller employees any warning of the approach of unattended cars on track 13 did not depend alone upon the existence of actual car icing operations or the presence of a salt car on track 13. Crump, the yardmaster, had actual knowledge that Addison-Miller employees were engaged in work on and around the icing dock at the time the cars were disengaged in front of the yard office pursuant to his orders (Tr. 796-799), and from illumination of the overhead white lights on the icing platform, switching foreman Prophet had certain indication that Addison-Miller employees were working on and around the dock, the cars and track 13 (Tr. 394, 396, 418, 419). Neither took these facts into consideration (Tr. 799, 403, 404) and absolutely no precaution was taken to warn or protect the men endangered by the ap-

proach of the drifting cars (Tr. 397, 402). On this evidence alone a jury finding could properly be made that appellant was guilty of the grossest negligence.

Likewise, the question of contributory negligence did not depend alone upon the existence of icing operations or the presence of a salt car on track 13. As to contributory negligence, the jury was entitled to consider the facts that work was in progress on and around the icing dock, that the white lights were illuminated as notice to appellant of work in progress, that Stintzi and his co-workers had never seen cars drifted down track 13 when any work was in progress about the icing dock and had no reason to anticipate that such would be done, and that Stintzi, 17 years of age, could reasonably assume that a foreman of 26 years experience would not order him to cross track 13 if any danger were involved in doing so.

On the evidence, aside from the presence of a salt car on track 13, there was more than sufficient in the record to justify the jury's finding that Stintzi was not contributorily negligent. The conflict in the evidence as to whether a salt car unloading operation was in progress at the time of Stintzi's injury, and as to its effect on the questions of primary and contributory negligence, were matters for argument by respective counsel and were not matters for instruction by the Court.

ANSWER TO

SPECIFICATION OF ERROR IX

As a result of the accident the minor, Gerald Stintzi, suffered profound shock, he was practically pulseless. The boy suffered a traumatic amputation of the right leg at the hip and is unable to wear a prosthetic device (Tr. 479); he suffered a fracture of the left thigh bone, and compound fractures of the right forearm. The traumatic amputation of the right leg also left a wound extending into the scrotum and rupturing the urethra, with evulsion of the right testicle. The bladder was ruptured at the outlet, there was a fracture of the right pelvic bone, and some internal hemorrhage. The injuries were critical, and the physician despaired of the boy's life. Numerous surgical operations were performed, including re-amputation, metal plates were put in the forearm, pins were put into the left leg. Skin was grafted from the abdomen onto the stump at the thigh, the forearm had to be re-opened, the hand and fingers of the right arm became stiff and remain so (Tr. 443-464). Stintzi was given twelve or more transfusions, and he was in the hospital 256 days in all (Tr. 137). He suffered terrific pain and delirium (Tr. 299-303). Gerald Stintzi requires assistance to bathe, and his mother, a graduate nurse, has cared for him since he was injured. Prior to his injury this boy was one of the most prominent athletic prospects in this area. His special dam-

ages thus far are over $12,500.00. The court, properly instructed that in awarding damages the jury should consider the nature and extent of the injuries, pain and suffering, past and future, discomfort, humiliation and embarrassment, permanency of the injuries, future medical and future personal care, loss of function.

Appellant took no exception to the instruction and proposed none. The figures proposed by appellant are wholly inapplicable—they are not assigned to the pertinent factors constituting the basis of award. There is no provision for personal care, for pain or suffering, etc., and this Court is not so unrealistic that it does not apperciate that from the award must come the costs of litigation. The verdict is not in fact such as would shock the conscience. In *Southern Pacific v. Guthrie,* 180 Fed. 2d 398, this Court sustained an award for $100,000.00 to a 61 year old railroad engineer who lost his leg midway between the knee and thigh and announced the rule that a Federal Appellate Court has no right to reduce damages, if both sides had a fair trial on the merits.

Also see: *United States v. Luehr,* 208 F. 2d 138, 9th Circuit—Award of $125,000.00 sustained.

Florida Power and Light Co. v. Robinson, 68 So. 2d 406—award of $225,360.00 sustained.

Kieffer v. Blue Seal Chemical Co., 196 F. 2d 614, 3rd Circuit—award of $250,000.00 sustained. (Although award not mentioned in affirmance, same was

returned in U. S. District Court, District of New Jersey, No. 273.)

Sullivan v. City and County of San Francisco, No. 401150. Award of $159,500.00.

This Court is familiar with the fact that there are well over fifty cases involving awards in excess of $100,000.00, and further citation is unnecessary in view of the injuries and loss suffered.

Photographs are clearly admissible in evidence in black and white or colored. Such is the overwhelming weight of opinion.

> "Exhibit P-9 was a picture of Dorothy Robertson as she appeared when the photographer came. It shows her face swollen and one eye blackened. She testified the condition of her face was due to a blow by defendant, administered immediately after the shooting while she was trying to help her wounded husband. The picture was admissible as illustrative and possibly somewhat corroborative of Dorothy's testimony.
>
> "Defendant argues it was calculated to excite passion and prejudice. *That might be true to the extent the photograph is more effective than oral description.* The articulate or eloquent witness has that same advantage over one less vocally endowed, but his testimony is not thereby rendered inadmissible." (emphasis supplied)
>
> *State v. Ebelsheiser,* 242 Iowa 49, 43 N.W. (2d) 706, 19 A.L.R. (2d) 865 (1950).
>
> *"Clinical photographs are not rendered inadmissible by the fact that they portray injuries more strikingly than oral testimony;* for the jury is entitled to know the true condition of the plaintiff, and when this can be shown more accurately by photographs than by oral testimony

of doctors or others, the photographs are competent evidence. This being the case, even gruesome photographs of injuries are admissible when relevant and material, for if they show facts the jury should know, the fact that such conditions may awaken sympathy in the minds of the jury does not render the pictures incompetent." (emphasis supplied)

18 Mountain Law Review (April 1946), pages 212 and 213;
Harris v. Snider, 223 Ala. 94, 134 S. 807;
Green v. Denver, 111 Colo. 390, 142 Pac. 2d 277;
State v. Long, 195 Or. 81, 244 Pac. 2d 1033;
Kauffman v. Meyberg, 140 Pac. 2d 210 (California)—infra-red;
State v. Cunningham, 173 Or. 25, 144 Pac. 2d 303—infra-red.

Enlarged pictures are admissible in evidence.

Wesley v. State, 26 S. 2d 413 (Alabama);
Sim v. Weeks, 45 Pac. 2d 350 (California);
Sack v. Sickman, 23 N.W. 2d 706 (Nebraska);

Also see. *Modern Trials,* Belli, and Medical Photography as a Boon to Trial Lawyers—Averbach (Medical Trial Technique Quarterly, Dec. 1954).

CONCLUSION

In conclusion we submit that under the evidence it was established, even as a matter of law, that Stintzi, in crossing Track 13, was acting by virtue of an implied invitation established by continuous usage of the common dumping ground north of Track 13 over a period of 10 to 26 years, and by appellant's acquiescence in such practice. In any event, viewed in the

light of the evidence most favorable to appellee, the question of Stintzi's status as an invitee, the question of appellant's primary negligence in failing to take any precaution to warn or protect the Addison-Miller employees who appellant knew, or should have known, would be endangered by the drifting of cars down Track 13, and the question of any contributory negligence on the part of Stintzi under the circumstances existing, were all questions clearly within the province of the jury to determine.

The jurors in this case were a typical cross-section of business men, farmers and average wage earners. No contention is made of some failure or defect in that respect. The Court's instructions were eminently fair, and in one respect, i.e. the status of Stintzi, the Court instructed the jury exactly as appellant requested.

On the facts and authorities detailed and cited herein, we respectfully submit that the judgment of the District Court should be in all respects affirmed.

Respectfully submitted,

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United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Appellant,

vs.

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Appellee.

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APPELLANT'S REPLY BRIEF

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TABLE OF CASES

1. THE FACTS

We are deeply concerned with the liberties which have been taken with the record in appellee's brief and the great extent to which statements are made therein which are wholly unsupported by the record, notwithstanding parenthetical page references to the record purportedly supporting such statements. In view of the many such instances in appellee's brief, it will be impossible to detail each one of these inaccuracies within the permissible limits of this reply brief. We therefore most respectfully urge this Court to refer to the entire printed record for the purpose of determining what the evidence disclosed. We will now refer to some of the more glaring examples of unsupported statements in appellee's restatement of the case.

Appellee says at page 4, "For at least 10 years it had been the *accepted practice* of Addison-Miller employees to dump this slush ice, salt sacks and other debris on the dumping ground north of track 13." No witnesses testified as to any such *accepted practice*, and the use of this phrase is wholly without support or license, either in the transcript references appended to this statement by appellee, or elsewhere in the record. Mr. Fincher, the Addison-Miller foreman, testified that the Addison-Miller employees had, to an undisclosed extent, been dumping such items north of Track 13 for at least 10 years on their own initiative, but he never said or inferred that such practice was *accepted* by appellant railway company, nor is there any evidence in the record or evidence justifying an

inference that appellant railway company ever knew of such practice or countenanced it in any way. The use of the word "accepted" is doubtless intended to imply to this Court that appellant knew of such practice and acquiesced in it, notwithstanding the utter absence of any evidentiary basis for such a finding.

On page 4 appellee says, "it is admitted that the presence of this material on the dumping ground could only mean that it was carried there across track 13 by Addison-Miller employees (Tr. 790)." The foregoing transcript reference is a part of the testimony of James Crump, appellant's assistant yardmaster. He had just testified that he had no knowledge whatsoever that Addison-Miller Co. ever dumped anything across and north of Track 13 (Tr. 788-790). He was then asked by appellee's counsel,

> "Q. You don't recall. Well if you had seen that, the presence of slush ice in that common dumping ground over this 15 years of your experience prior to 1952, you knew and realized that to get that ice there from the slush pit in the icing dock, someone had to carry it across track 13 to that dumping ground, did you not?
>
> A. Yes, it would have to be carried by someone."

This question and answer were purely argumentative. We do not deny that Addison-Miller employees had been dumping across Track 13 and that to do so they would have to carry the material across the track, but we do say that there is absolutely no evidence that appellant, or any of its lowliest employees for that matter, ever had any knowledge thereof. Again this statement would seem to represent an in-

tent to imply something to this Court which is wholly without basis in the record.

At pages 5 & 6 appellee says, "A sure indication as to whether Addison-Miller employees were working on or about the icing dock *and tracks 12 and 13* during hours of darkness was the illumination of the overhead lights on the icing platform." The foregoing statement is reiterated in various places throughout appellee's brief but is not supported by any reference to the transcript and is without support in the record. There was testimony by Northern Pacific employees that the illumination of the overhead lights on the icing platform would indicate to them that Addison-Miller employees were working on or about the icing dock, but no one testified that the illumination of the overhead lights would indicate that any Addison-Miller employee was working *on Tracks 12 and 13.* We are certain that the Court will understand that there is a vast difference between knowledge that employees were working on and about the ice dock and knowledge that employees were working on the railroad tracks. As a matter of fact, there is absolutely no evidence in the record that any Northern Pacific employee ever knew that Addison-Miller employees ever worked under any circumstances on Tracks 12 and 13 or any other track in the yard. On the contrary, the record discloses that, so far as appellant was aware, Addison-Miller employees had no occasion to ever be on any of the trackage. It is quite true the illumination of the overhead lights on the icing platform would tend to indicate that the Addison-Miller

men were doing some work about the dock, but such knowledge would constitute no reason for appellant's employees to be apprehensive as to their possible presence on trackage or on or about cars standing on the tracks.

At page 6 appellee says, "A refrigerator train for icing was due in the yard at 9:35 p.m. (Tr. 594) and another fruit train was due at 11:30 p.m. (Tr. 793)." At page 594 of the record one of appellant's employees, Gordon Williams, was asked on cross-examination when, after 7:00 p.m., the next train arrived that had cars to be iced, and he answered, "What time did that train come in? I can't recall. 9:35 wasn't it?" He had already testified on direct examination by reference to railroad records that in the train that arrived at 9:35 p.m. there were no cars to be iced, and that following 7:00 p.m. the next train that came in that had any cars to be iced was one arriving at 11:35 p.m. with one icer in the train (Tr. 582). The other transcript reference relied upon by appellee in support of the above statement is page 793. There, the witness Crump testified that after 7:00 p.m. the next train that came in with a car to be iced was at 11:30 p.m. and that there were no cars to be iced out of the 9:35 train. Appellee's statement that a refrigerator train for icing was due in the yard at 9:35 p.m. appears to represent an attempt to afford basis for arguing that appellant and its employees should have known at the time of the accident that Addison-Miller employees would be busily engaged in preparing to ice the alleged 9:35 train, and appellee does so argue elsewhere in his brief. The record conclusively shows

that after 7:00 p.m. there were no cars to be iced until 11:30 p.m.

At page 7 appellee says, "Some time around 7 p.m. Stintzi, Allen Maine and Ray Davis, left the premises for supper. On their return to the icing platform they were advised that ice had become caked up *and trouble had occurred in the conveyor belt* near the slush pit or sump (Tr. 186, 790)." There is no support in the record for the underlined portion of the statement. This statement is a sort of half-truth derived from the following testimony of appellee Stintzi at pages 185 & 186 of the record.

> "Q. Did you know where it was that you were supposed to work? A. Yes. Q. How did you know that? A. He said near the pulley where the ice was caked up and it is downstairs where they were having trouble, and so — then he said to go down there and so on."

The foregoing is the sole support in the record for any claim that there was any trouble, and there is nothing in the record to indicate what the alleged trouble was or whether it in any way interfered with the operation of the plant or conveyor system.

At page 7 appellee says, "Another part of the crew was instructed to unload salt from a salt car then spotted in a line of cars on track 13 opposite the salt pit." This statement is wholly without support in the record, either in any of the many transcript references appended by appellee, or otherwise. There is absolutely no testimony in the record that any of the Addison-Miller employees were instructed to unload salt from the salt car. Even Stintzi and Allen Maine never so testified, the limits of their testimony being

that when they were carrying the buckets of ice beneath the couplings of the freight cars, they noticed that a salt car was being unloaded to the east. Stintzi's friend, Ray Davis, only testified that he was instructed by Fincher to "work in the salt pit" (Tr. 317-318). Foreman Fincher testified positively that there was no salt car being unloaded at the time, and when he instructed Stintzi and the others to carry out the slush ice he did not then have any knowledge that there were even any cars on Track 13 (Tr. 722). Again we say that neither Stintzi nor Allen Maine nor Ray Davis, nor any other Addison-Miller employee, or anyone else, ever testified that a part of the crew was instructed to unload salt from any alleged salt car then spotted on Track 13.

At page 8 appellee says that Stintzi and Maine were directed by Fincher to dump the slush ice north of Track 13, and then says, "The foreman, Fincher, knew there was a string of cars on track 13 (Tr. 722)." There is an utter absence of any evidence that Mr. Fincher, when he instructed Stintzi and Maine to dump the slush ice, knew that there was a string of cars on Track 13. At page 722 of the record, Mr. Fincher categorically denies that he knew that there were any cars on Track 13 when he so instructed Stintzi and Maine, and he testified that he didn't know of the presence of the cars until later when he went outside of the building and then saw cars there and saw Stintzi and Maine carrying the buckets of ice beneath the couplings, and then told them that they should not do this because of its danger and should go around the end of the cars (Tr. 722, 720,

719). The quoted statement is wholly unsupported elsewhere in the record, and even Stintzi and Maine did not presume to so testify.

On pages 9-10, and also on page 11, appellee again reiterates the statement that the illumination of the overhead lights on the icing platform was a certain indication that Addison-Miller employees were working *on the tracks.* We have already discussed this wholly unwarranted and unsupported statement.

At page 11 appellee says that a loud speaker system and telephone communication system "had previously been used to advise Addison-Miller employees of the movement of cars (Tr. 397-402)." The foregoing transcript reference does not support this statement nor is it supported elsewhere in the record. There is absolutely no evidence that the loud speaker system or the telephone communication system had ever been used or was ever intended to be used to advise Addison-Miller employees of the movement of cars. At pages 397 to 402 of the record and also at page 415 appellant's switch foreman, Mr. Prophet, only testified that the loud speaker system was on occasion used to advise switchmen of the movement of cars and he at no time testified that it had ever been used to advise or warn Addison-Miller employees.

2. WAS STINTZI AN INVITEE? (Appellee's Br. pp. 12-28)

At pages 12 to 28 of his brief, appellee seeks to contend that the question of whether appellee was an invitee was properly left to the jury for determination. We freely concede that the question of whether one's status is that of invitee, licensee, or trespasser is, as with all other factual questions, ordinarily for the determination of the jury. Countless cases can be found so stating. But that, of course, does not mean that it is always a question for the jury, and it is our position that this is the exceptional case where, upon the undisputed facts, this Court can and should say that as a matter of law appellee was not an invitee and so cannot recover in this action.

First, viewing appellee's argument in this respect in its entirety. In the conclusion to appellee's brief, the argument on this point is summed up as follows: Stintzi, in crossing Track 13, was acting by virtue of an implied invitation established by continuous usage of the common dumping ground north of Track 13 over a period of 10 to 26 years and by appellant's acquiescence in such practice; and it is contended that the Court should so hold as a matter of law or at least a jury should be permitted to so find.

It is quite true that it was the testimony of the Addison-Miller foreman, Mr. Fincher, that for a number of years Addison-Miller employees had been dumping some empty salt sacks, slush ice and other debris north of Track 13. We should point out, however, that there is no evidence of how much dumping was

involved in this practice. There is no evidence as to on how many occasions slush ice was dumped north of Track 13. Mr. Fincher testified that he only had occasion to do this two or three times in his experience. He did say that slush ice was more frequently dumped during the daytime shift than on his shift, but he was not asked to nor did he estimate how frequently this had occurred on the daytime shift, and no other witness testified on the subject. Likewise, there was testimony by Mr. Fincher that in the four or five years since paper salt sacks were used that these were customarily disposed of north of Track 13, but again Mr. Fincher was not asked to nor did he undertake to estimate how frequently this would occur or how many salt sacks were involved. There was no showing at all of what other debris might have been dumped there by Addison-Miller employees or how frequently.

We now come to the statement in the conclusion of the brief as to "appellant's acquiescence in such practice." Also at page 28 appellee says, "This continuous usage of itself establishes appellant's acquiescence in it." This statement seems to be the meat of appellee's position, but appellee points to no authority to support such a contention. In fact the law, particularly in Washington, is directly to the contrary.

In *Imler vs. Northern Pacific Ry. Co.,* 89 Wash. 527, 154 Pac. 1086, the Court denied recovery as to one who was crossing railroad trackage along a footpath which the evidence disclosed had been long and customarily used by the public. The Court said:

> "Under such circumstances, it has been held that a use, however long continued, will not imply a license. *Burg v. Chicago R.I.&P. Co.,* 90 Iowa 106, 57 N.W. 680, 48 Am. St. 419; *Ward v. Southern Pac. Co.,* 25 Ore. 433, 36 Pac. 166, 23 L.R.A. 715. And such would seem to be the logical result of the opinion of this court in the case of *Hamlin v. Columbia & Puget Sound R. Co.,* 37 Wash. 448, 79 Pac. 991, and *Dotta v. Northern Pac. R. Co.,* 36 Wash. 506, 89 Pac. 32."

There is a vast difference between knowledge and acquiescence. Possibly a long-continued use of a way across railroad tracks might be sufficient to warrant an implication of notice or knowledge thereof to the railroad company, but even this only if such use was so regular and frequent and so obvious as to warrant an inference that it was known to the railway. However, no such situation exists here. As before pointed out, there is no evidence as to how frequently or extensively Addison-Miller employees crossed Track 13. A glance at exhibits 10 and 12 will show that the area between Tracks 13 and 14 for many hundreds of yards, not only along the Addison-Miller icing dock, but far beyond it, was filled with the debris cleaned from appellant's cars. It is highly unlikely, even though Addison-Miller employees were occasionally dumping salt sacks or slush ice among the other debris, that such would be noticed or known to appellant's employees and most certainly it was not likely to be known by appellant's supervisory personnel so as to charge appellant with knowledge thereof. At most, the record here shows an infrequent and sporadic crossing of Track 13 and nothing from which it might be reasonably inferred that appellant knew

about it. Moreover, even if appellant did *know* about it, the *Imler* case is authority for the proposition that such would not constitute an *acquiescence* in such practice or a *license* so to do, and most certainly not an invitation.

The Court's attention is now directed to the phrase, "common dumping ground," to which appellant referred in its opening brief and to which appellee has constantly referred in his brief. This phrase had its origin in the cross-examination by appellee's counsel of the witnesses Corrigan and Crump, appellant's yardmaster and assistant yardmaster respectively. As to Mr. Corrigan, appellee's counsel asked ,"Then Mr. Corrigan, from your long experience out there at the yard, you were familiar with the fact that immediately to the north of track 13 and between track 13 and track 14 there is a common dumping ground? A. Yes." (Tr. 547). The witness Crump was likewise asked, "Q. And you are familiar with the fact, as is shown on Exhibit No. 12 here, that immediately to the north of track 13 there was a common dumping ground? A. That's right." (Tr. 788). Both of these witnesses were immediately thereafter asked whether they had ever seen or knew of the dumping of slush ice and salt sacks in that area by Addison-Miller Co., and both of said witnesses categorically denied ever having seen such a thing or knowing thereof.

The foregoing is the only manner in which the phrase "common dumping ground" came into the record. Neither Mr. Corrigan nor Mr. Crump, nor any other witness, on their own initiative ever so characterized the area between Track 13 and Track 14. Both

Mr. Corrigan and Mr. Crump subsequently explained that the area was a common dumping ground only to the extent that it was used by Northern Pacific employees as an area to dispose of debris cleaned out from freight cars placed on Track 14, which was designated in the yard as the clean-out track and the north rails of which were slightly elevated above the south rails so that the cars placed thereon would slope to the south, so that debris in the cars could be easily removed onto the area between Track 13 and Track 14 (Tr. 554, 811).

This Court quite recently, in *Northern Pacific Railway Co. vs. Mely,* 219 Fed. (2d) 199, indicated that the answers to such leading questions had little dignity. In that case, a District Court judgment against the railway company was reversed and the action ordered dismissed, and in the course of the opinion it was said,

> "There was no proof here of any nature which indicated a failure of railway to notify Mely that No. 1648 was ahead of him. Under leading questions, the fireman and brakeman testified uncertainly that they were not informed of it."

The phrase, "common dumping ground" was one created by appellee's counsel, and it is quite conclusively shown from the testimony of the witnesses Corrigan and Crump that the area in question was not a common dumping ground in the sense that Addison-Miller employees were ever given any right to dump there but, rather, that it was simply common to the employees of Northern Pacific Railway Company.

We now notice the following specific things appear-

ing in the course of appellee's argument on the invitee question.

The cases cited by appellee at page 14 of his brief simply state the fundamental rule as to who is an invitee. In none of them was there any serious question raised as to the status of the plaintiff and all were clear-cut situations.

At page 16 appellee seeks to have the Court believe that the cleaning of the slush ice by Stintzi and the others at the time in question was absolutely necessary to the continued operation of the dock. There was no such showing made. There was no showing that the operation of the conveyor belt was interrupted or in any danger of being interrupted at the time in question. The only testimony in the record lending some comfort in this respect is his own answer on page 186 of the record, "He said near the pulley where the ice was caked up, and it is downstairs where they were having trouble, and so — then he said to go down there and so on." From this one isolated answer of appellee, his brief throughout seeks to create the impression that there was evidence that there was trouble in the conveyor belt which was interfering with its continued operation. On the contrary, there was no showing as to what trouble he was referring to, and even if the conveyor belt's operation was impaired, the development of such a situation could not be stretched into an invitation to Stintzi to cross Track 13 beneath the couplings of standing freight cars.

At page 19 appellee quotes certain testimony of Mr. Fincher, the Addison-Miller foreman, as being

"the conclusive and ultimate proof that appellant recognized the area north of track 13 as a common dumping ground for Addison-Miller in its ice operation." The testimony quoted in this respect is Mr. Fincher's testimony as to what he told Stintzi and Maine about going around the cars rather than through them. We are completely unable to understand how what Mr. Fincher said in this respect has any bearing upon what appellant railway knew or recognized. Again we say that there is utterly no evidence in the record that appellant railway company ever knew, recognized or intended that Addison-Miller employees should use the area between Tracks 13 and 14 as a dumping ground.

Likewise, there is no evidentiary basis whatsoever for the statement on page 20 of appellee's brief that "these officials knew that the use of the area by Addison-Miller was contemplated by the contracting parties and was reasonably embraced within the work area of Addison-Miller employees (Tr. 547, 788, 789)." The foregoing transcript references used by appellee to support this statement are simply transcript references to the leading questions of appellee's counsel as to the "common dumping ground," which leading questions and answers were heretofore discussed. There is utterly no license in the record for the above-quoted statement, directly or by inference.

Appellee, at pages 21 to 23 of his brief, cites *Great Northern vs. Thompson,* 199 Fed. 395, and *Imler vs. Northern Pacific Ry. Co.,* 89 Wash. 527, 154 Pac. 1086, in support of the statement that "implied invitation arising from the facts in this case has judicial ap-

proval in the State of Washington." We respectfully urge the Court to examine both of the foregoing cases to see for itself whether the *Imler* case furnishes any authority for the quoted statement from appellee's brief. The *Imler* case simply cited *Great Northern vs. Thompson,* 199 Fed. 395, and distinguished it. The *Imler* case denied recovery to one walking along a foot path which people had been long accustomed to using to cross the railroad tracks, saying

> "Under such circumstances, it has been held that a use, however long continued, will not imply a license."

At pages 24 and 25 of his brief, appellee cites and discusses the case of *Chicago I. & L. R. R. Co. vs. Pritchard,* 168 Ind. 398, 79 N.E. 508, and appellee states the facts of that case to be that "an employee of a shipper loading poles on a railroad car went around the end of the car for some purpose which the evidence did not directly disclose, and as a result was struck by a train approaching the area." We urge the Court to refer directly to this case, and it will be found that the facts, on the contrary, were that the employee heard someone shout "Stop that train," and with all the other members of the crew, rushed to the other side of the car where appellant was struck by poles falling off of the car which he and others had been loading, due to a defective hanger on the car, and that the poles by striking his body threw him onto adjacent railroad tracks where he was struck and killed by an oncoming train. He did not go onto the railroad tracks on which he was struck and killed but was thrown onto the tracks by the logs which tumbled from the car by reason of the railroad

company's negligence in furnishing a car with a defective hanger.

We have no quarrel with the statement made by appellee at page 26 that, "the great weight of authority supports the proposition that the invitation extends to those parts of the premises, where the invitee under circumstances and conditions of his invitation would naturally be likely to go; or such premises as would reasonably be embraced within the object of the invitee's visit." The cases cited by appellee at page 26 simply state that fundamental proposition and have no factual similarity with the case at bar. In fact, nearly all of the cases cited at page 26 of appellee's brief recognize that an *unreasonable* or *unexpected* activity is not within an invitation.

At pages 26 to 28, appellee lists by alphabetical letter six items, upon the basis of which appellee says the jury properly found Stintzi to be an invitee. These listed items consist entirely of what Addison-Miller Co. did and what Foreman Fincher instructed Stintzi and Maine to do, and what Stintzi and Main saw as they were about their perilous adventure. Nowhere among these items are there any facts stated as to any knowledge on the part of appellant railway company, or any facts upon which it might be inferred or concluded that appellant railway company had any knowledge as to what was being done. We again say that the only evidence which can establish a permission, and beyond that an invitation, must be of acts or conduct of the appellant railway company, and there is no such evidence in the record.

We again respectfully submit that this Court should hold as a matter of law that Stintzi was not an invitee on appellant's premises at the place of his injury and that the action should in consequence be reversed and ordered dismissed.

3. APPELLEE'S ANSWER TO SPECIFICATION OF ERROR VI (Appellee's Br. pp. 34-36)

This specification of error dealt with the claimed error of the Court in instructing the jury at appellee's request that, even though Addison-Miller Co. was negligent, if the railway company was "guilty of negligence *in any degree*" * * * "which contributed proximately *in any measure* to the injuries sustained by Gerald Stintzi," that the jury's verdict *must* be in favor of Stintzi, "unless you should further find from the evidence that the minor was guilty of negligence which directly and proximately caused the injuries sustained by Gerald Stintzi or substantially contributed thereto" (Tr. 886-887).

Appellee's answer to this claim of error seems to concede that the instruction complained of was faulty, but appellee urges that with the instructions considered as a whole the Court should not hold the error prejudicial.

By way of replying to this contention, we can only ask the Court to consider the instructions as a whole. We are certain it must be concluded that the obvious vice of this instruction cannot be overlooked on that basis. The instruction in question was the heart of the matter. No one seriously contended that Addison-

Miller Co. and its foreman were not largely responsible for this unfortunate accident. This was the instruction that the jury must necessarily have relied on largely to support its verdict against appellant. It is impossible to say afterwards to what extent one or more of the jurors placed undue or heavy reliance on any particular instruction. The criticized instruction clearly imposed different standards of care on the Northern Pacific Railway Company than on Gerald Stintzi.

The Supreme Court of Washington has held to be reversible error language such as "negligence in any degree."

Spurrier vs. Front St. Ry. Co., 3 Wash. 659, 29 Pac. 346;
Atherton vs. Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39;
Cowie vs. Seattle, 22 Wash. 659, 62 Pac. 121;
Price vs. Gabel, 162 Wash. 275, 298 Pac. 444.

Likewise, the Supreme Court of Washington has held to be reversible error language such as "which contributed in any measure."

Rainier Heat & Power Co. vs. Seattle, 113 Wash. 95, 193 Pac. 233;
Danielson vs. Carstens Packing Co., 121 Wash. 645, 210 Pac. 12.
Price vs. Gabel, 162 Wash. 275, 298 Pac. 444.

Appellee cites the case of *Davis vs. Falconer,* 159 Wash. 230, 292 Pac. 424, where the court held the words, "any negligence," to be not reversible error. We submit that there is a vast difference between the words, "any negligence," and the words, "negligence in any degree."

4. APPELLEE'S ANSWER TO SPECIFICATION OF ERROR VIII (Appellee's Br. pp. 40-41)

This specification of error was based upon the refusal of the District Judge to give appellant's requested instruction to the effect that if the jury should find that there was no salt car being unloaded on Track 13 at the time of Stintzi's injury their verdict must be for the defendant (Tr. 36-37). Appellee insists in defense of the action of the District Judge in refusing this request, that the jury was entitled to find Stintzi not contributorily negligent even if there was no salt car on Track 13. We again submit, however, that the claim of Stintzi that a salt car was being unloaded at the time he went between the standing cars furnished his sole possible excuse for his dangerous conduct. An examination of his testimony will show that this was the only excuse that he himself advanced for doing what he did, testifying that he felt the alleged presence of the salt car was insurance that the cars would not be moved. We again submit that, if a salt car was not present, reasonable minds could not possibly differ on the subject of the grossly negligent nature of his own decision to cross between the standing cars and that under the facts of this case the requested instruction was fully warranted and it was imperative that the District Judge give it to assure a fair trial to appellant in view of the most conclusive nature of the testimony offered by appellant, by its records and by the testimony of Mr. Fincher, that there was no such salt car being unloaded at the time, or at any other time that day.

5. CONCLUSION

Neither appellee's brief nor the record discloses any acts or conduct of appellant railway company implying a license, or beyond that an invitation, to Addison-Miller employees to cross Track 13 in any manner, least of all by crawling beneath the couplings of standing cars. Likewise, appellee has cited no case where one was ever held to be an invitee while crawling beneath couplings, and we are certain that there can be no such case.

Accepting everything that is said in appellee's brief, we would still insist that Stintzi could not have been an invitee while engaged in the unreasonable and dangerous expedient of crawling beneath the couplings of these cars, and in this connection we again point to the following quotation appearing in *Hansen vs. Lehigh Valley Ry. Co.,* 120 Fed. (2d) 498,

> "When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters."

It is our earnest belief that this judgment should be reversed and the action ordered dismissed.

Respectfully submitted,

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Spokane, Washington
Attorneys for Appellant.

No. 14635

United States
Court of Appeals
For the Ninth Circuit.

NICK JOHN KALINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-25-55

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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In the United States District Court in and for the Southern District of California, Central Division

No. 23911 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NICK JOHN KALINE,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act]

The grand jury charges:

Defendant Nick John Kaline, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 110, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America, on May 26,

1954, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and [2*] there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill,

/s/ W. H. REPLOGLE,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

Bond fixed in the amount of .....

[Endorsed]: Filed November 3, 1954. [3]

[Title of District Court and Cause.]

MINUTES OF THE COURT—NOV. 15, 1954

Present: Hon: James M. Carter,
District Judge.

U. S. Att'y., by Ass't. U. S. Att'y.: Bruce A. Bevan.

Counsel for Defendant: J. B. Tietz.

Defendant is present (on bond).

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Proceedings:

For Arr. and Plea.

Defendant is arraigned and enters a plea of Not Guilty.

It Is Ordered case set for trial, with a Jury, for November 23, 1954, at 10 a.m.

EDMUND L. SMITH,
Clerk.

By L. B. FIGG,
Deputy Clerk. [4]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Nick John Kaline, Defendant, in the above-entitled matter, through their respective counsel, as follows:

That it be deemed that the Clerk of Local Board No. 110 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Nick John Kaline, is a registrant of Local Board No. 110.

3. As Clerk of Local Board No. 110. she is legal custodian of the original Selective Service file of Nick John Kaline.

4. The Selective Service file of Nick John Kaline is a record kept in the normal course of business by Local Board No. 110. and it is the normal course of Local Board No. 110's business to keep such [5] records.

It Is Further Stipulated that a photostatic copy of the original Selective Service file of Nick John Kaline, marked "Government's Exhibit 2" for identification, is a true and accurate copy of the contents of the original Selective Service file on Nick John Kaline.

It Is Further Stipulated that a photostatic copy of the Selective Service file of Nick John Kaline, marked "Government's Exhibit 2" for identification, may be introduced in evidence in lieu of the original Selective Service file of Nick John Kaline.

Dated this 23rd day of November, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Ass't. United States Attorney,
Chief of Criminal Division;

/s/ MANUEL L. REAL,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

/s/ J. B. TIETZ,
Attorney for Defendant.

/s/ NICK JOHN KALINE,
Defendant.

It Is So Ordered this 23rd day of November, 1954.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed November 23, 1954. [6]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The Hearing Officer of the Department of Justice abused his discretion when he failed to give defendant another opportunity for a hearing after defendant had promptly explained why he didn't appear on February 4, 1954, at 3:30 p.m., and after defendant had requested another opportunity to be heard by said Hearing Officer. [7]

4. The Selective Service System and/or the Department of Justice denied defendant due process of law in that he was not afforded a hearing before a Hearing Officer after February 4, 1954.

5. Defendant's liability for service was illegally extended beyond age twenty-six.

6. Defendant was illegally reclassified from Class I-O to Class I-A on November 20, 1952.

7. Defendant was illegally reclassified into Class I-A-O on December 19, 1952.

8. Defendant was illegally deprived of a Class IV-D exemption on February 17, 1949.

9. The Department of Justice deprived defendant of his right to a fair and correct recommendation to the Appeal Board in that the Department's recommendation was based on artificial and illegal considerations.

10. The undisputed evidence shows that the defendant was deprived of a fair hearing before the hearing officer of the Department of Justice in that the conclusions of both the Hearing Officer and the Attorney General are inconsistent with and not supported by the findings of fact.

11. Defendant was denied procedural due process in that the local board failed to have available an Advisor to Registrants and to have posted conspicuously or any place, the names and addresses of such adviser, as required by the Regulations, and to defendant's prejudice.

12. The failure of the Court to compel the production of the F.B.I. investigative report and the report of the Hearing Officer to the Attorney General and the order of the Court sustaining the motion to quash the subpoena duces tecum made by the Government, constitute a deprivation of the defendant's rights to due process of law upon criminal trials contrary [8] to the Fifth Amendment to the United States Constitution and the right to confrontation guaranteed by the Sixth Amendment, and also

violate the statutes and rules of the Court providing for the issuance of subpoenas in behalf of defendants in criminal cases.

13. The denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer of the Department of Justice and by the Department of Justice to the board of appeal were without basis in fact, arbitrary, capricious and contrary to law.

/s/ J. B. TIETZ,
Attorney for the Defendant.

Clerk—File nunc pro tunc as of date of trial.

/s/ JAMES M. CARTER,
District Judge.

12/21/54.

Nunc pro tunc filed November 23, 1954.

[Endorsed]: Filed December 21, 1954. [9]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 13, 1954

Present: Hon. James M. Carter,
District Judge.

U. S. Att'y., by Ass't. U. S. Att'y.: Cecil Hicks, Jr.

Counsel for Defendant: J. B. Tietz.

Defendant present (on bond).

Proceedings:

For further trial proceedings after submission of the cause.

Attorney Tietz argues for defendant.

Court Finds defendant guilty as charged and waives report by Probation Officer, and Orders cause continued to 2 p.m., December 20, 1954, for sentence, and that defendant may remain on bond pending sentence.

EDMUND L. SMITH,
Clerk.

By L. B. FIGG,
Deputy Clerk. [10]

[Title of District Court and Cause.]

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL AND, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

The defendant moves the Court for a judgment of acquittal upon the same grounds heretofore urged and, in the alternative to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of all the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

/s/ J. B. TIETZ,
Attorney for Defendant.

Dated at Los Angeles: December 17, 1954.

Affidavit of service by mail attached.

[Endorsed]: Filed December 16, 1954. [11]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 20, 1954

Present: Hon. James M. Carter,
District Judge.

U. S. Att'y., by Ass't. U. S. Att'y.: Cecil Hicks, Jr.

Counsel for Defendant: J. B. Tietz.

Defendant present (on bond).

Proceedings:

For (1) hearing on renewed motion of defendant, filed Dec. 16, 1954, for judgment of acquittal or for new trial;

(2) Sentencing (upon a finding of guilty).

Attorney Tietz argues motions.

It Is Ordered that defendant's motions for judgment of acquittal and new trial are denied.

Court Sentences defendant to four years' imprisonment for offense charged in Indictment.

Defendant files notice of appeal and an application for bail pending determination of appeal, and It Is Ordered that application for said bail is denied.

Defendant moves for stay of execution, and It Is Ordered that said motion is denied. It Is Further Ordered that defendant is remanded to custody and his bond exonerated.

EDMUND L. SMITH,
Clerk.

By L. B. FIGG,
Deputy Clerk. [13]

United States District Court for the Southern District of California, Central Division

No. 23911-Criminal

UNITED STATES OF AMERICA,

vs.

NICK JOHN KALINE

JUDGMENT AND COMMITMENT

On this 20th day of December, 1954, came the attorney for the government and the defendant appeared in person and by counsel, J. B. Tietz:

It Is Adjudged that the defendant has been con-

victed upon his plea of not guilty and a finding of guilty of the offense of failing and neglecting to perform a duty required of him under the Universal Military Training and Service Act and the regulations thereunder, in that he failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do, in violation of 50 U.S. Code, App., Sec. 462; as charged in the Indictment; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years.

It Is Adjudged that defendant is remanded to custody and his bond exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed December 20, 1954. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Nick John Kaline, resides at 2000 Laguna Drive, La Habra, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App. Sec 462—Selective Service Act, 1948, as amended.

On December 20, 1954, after a verdict of Guilty, the Court sentenced the appellant to confinement in an institution to be selected by the Attorney General for

I, J. B. Tietz, appellant's attorney being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed December 20, 1954. [15]

In the United States District Court, Southern District of California, Central Division

No. 23911-Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NICK JOHN KALINE,

Defendant.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,
United States Attorney, By
MANUEL REAL,
Assistant United States Attorney.

For the Defendant:

J. B. TIETZ, Esq.

Tuesday, November 23, 1954, 10 A.M.

(Other Court matters.)

The Clerk: No. 23911 Criminal, United States vs. Nick John Kaline.

Mr. Tietz: Ready for the defendant. The defendant is in Court.

Mr. Real: Ready for the Government.

In this case there is a preliminary matter for consideration, your Honor. As I told you this morning, the special agent in charge of the Federal Bureau of Investigation, Los Angeles office, was served yesterday afternoon with a subpoena duces tecum, and the office of the United States Attorney was also served with a subpoena duces tecum, to be in Court and to present or to have ready for presentation the secret recommendation of the Hearing Officer to the Department of Justice and the complete secret investigative report made by the FBI agents and/or others in the investigation of the conscientious objector claim made by the defendant and submitted to the Hearing Officer of the Department of Justice, considered by him and relied upon by him in making his report to the Department, and relied upon by the Attorney General in his recommendation to the Appeal Board of the Selective Service System. And also the correspondence between defendant and the Hearing Officer of February, 1954, on the subject [2*] of a resetting of the hearing date.

Also subpoenaed was the hearing officer Homer D. Crotty, and Lt. Col. Francis A. Heartwell.

The motion of the Government in this respect, your Honor, is that the subpoena duces tecum be quashed as to the secret recommendation of the Hearing Officer, what is termed secret recommenda-

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

tion of the Hearing Officer, and the investigative reports made by the Federal Bureau of Investigation, on the authority of the case of United States vs. Nugent, and also the provision 3229 of the Attorney General, which provides that those are confidential records and are not to be disclosed.

These matters have been considered in a great many cases, in fact, in practically every one of the cases that came up prior to the decision in Tomlinson and White, and have been, except for the appearances before Judge Mathes, quashed in every case.

I think I am right. Is that correct, Mr. Tietz?

Mr. Tietz: Locally, yes.

Mr. Real: In this district, yes.

The Court: Except in what cases?

Mr. Real: Except in the cases that were before Judge Mathes. And Judge Mathes established a procedure in the cases that were before him, Selective Service cases, of making an in camera inspection of the reports. However, the decision [3] of Judge Mathes was prior to the decision in the case of United States vs. Nugent. And since that decision has come down from the Supreme Court, it has been the view in this district, at least of the judges who have considered Selective Service cases since the Nugent case, that the motion to quash would lie.

The Court: Let me see the file.

Mr. Tietz, what is your view on the matter?

Mr. Tietz: The point we make in this case is the point that arose after the Nugent case, and it is based in part on the Nugent case, and the point

briefly is this: The Attorney General——

The Court: Where is the motion? Is it in here?

Mr. Real: As I told you this morning, it is an oral motion, since we were served yesterday afternoon and haven't had an opportunity to get it in writing.

The Court: Where is the subpoena?

Mr. Real: I have a copy here, if I may hand it up.

The Clerk: Do you have the original, Mr. Tietz, with the return on it?

Mr. Tietz: No. But evidently it has been served.

The Court: May I use the copy, Mr. Tietz?

Mr. Tietz: Yes. The copy is an exact copy of the original.

The Court: What is your point? [4]

Mr. Tietz: After the Nugent case, the Attorney General saw the light and adopted a procedure, adopted regulations — that is important, that he adopted regulations, too, but he adopted a procedure whereby every registrant professing to be a conscientious objector, who took an administrative appeal, was to receive, just before the Hearing Officer hearing, a few days before the Hearing Officer hearing, a resume, that is what they call it, a resume of the FBI investigative report, so when he came before the Hearing Officer he would know something of what the Hearing Officer had in the back of his head and know something about any of the bad things that were said against him and have a chance to meet them.

Now, my point here is this: How are we to know,

how is your Honor to know, that that resume is a fair one, even that it is an honest one, unless at least your Honor, as Judge Mathes did, makes an in camera inspection of the FBI reports? They are here now, and before your Honor can tell whether or not this resume, which we are going to present in evidence when we get into this case, which is in the file, I believe—how could your Honor tell it is a fair one unless your Honor sees the original FBI report?

The Court: Well, the Nugent case, as explained in the White case—wasn't it White?

Mr. Real: That is correct, your Honor. [5]

The Court (Continuing): Pretty well disposed of that. They pointed out the cases in Nugent which the Supreme Court relied upon, the kind of cases they were, and what the defendant got, and they pointed out that the defendant wasn't entitled to a complete examination, nor was it to be a sham, it was to be midway, and this resume would seem to be that. Isn't this the same situation that has been overruled by judges in this Court since the Nugent case?

Mr. Tietz: I have two answers to that.

First, the White case isn't permanent. Petition for a writ of certiorari has been filed. That is one thing.

In the second place, the White case in my opinion doesn't cover the present situation, because regulations have been adopted since, and there has been a change.

I have before me the slip opinion of the White

case. On page 10 the Court says: In other words, that is the way the Department did it. We find nothing in the opinion to indicate that the Supreme Court considered that the summary thus referred to was required by statute or the demands of due process.

Now, my point is that since then, since the processing of White, and since the Nugent case, the Attorney General has adopted regulations for his hearing officers. Now, remember, although the Nugent case refers to a resume, that was all in prospect, the Supreme Court, when it used that [6] language, didn't have before it any such thing as a resume. The Supreme Court meant—because there was no such thing before them—meant that fair dealing required that the registrant get such a thing. And immediately the Attorney General started a procedure, and in a few months he had it in effect, whereby a resume was given.

Now, the procedure back in the time of Nugent was this—somewhat similar but vastly different in principle: The hearing officers sent out, much as they do now, a three-page mimeographed notice to the registrant telling him to come, telling him that he can bring with him friends, that he can bring an attorney, this, that, and the other, it is informal. Now, in the version that has been used for the last several years, just before the Nugent case, not only in effect, but the last several years that version said to the registrant, if you want to know in advance of the hearing if there was any adverse information

dug up by the FBI against you, you call me up and I will let you know.

Now, that is what the Supreme Court had in mind as being or meeting a fair process. But it went further and they said he should get a resume. So, to repeat partially, the Attorney General saw the light and immediately set in motion machinery which now is in full effect, which gives every one of these fellows a typewritten resume of everything of materiality that was dug up against them. [7]

The Court: Doesn't the Attorney General's regulation go further than the factual situation in the Nugent case? Doesn't the man now get more than the Court found sufficient in the Nugent case?

Mr. Tietz: Yes, yes. But how are we to know that this resume is an honest one or is a fair one, unless we can compare it against something? Do we have to take their word?

The Court: How could you know, in the Nugent case, when the registrant called up the Hearing Officer, that the Hearing Officer gave him a fair report?

Mr. Tietz: In that case the point did not arise for two reasons. That is a peculiar thing, it was almost a moot decision. When you read the case, and especially footnote 10, there were two appellants joined, Nugent and Packard. As far as Nugent was concerned, the Court said he is not entitled to it because he didn't ask. He was told he could ask and he didn't ask. As far as Packard, the Court says this doesn't apply to him, because there is not one scintilla of adverse evidence.

When you have a situation where the fellow is pure as the driven snow, there is no whisper of any kind against him, this doesn't apply; but where, as in this case, we have people saying some things which do not reflect completely in his favor, then we have the situation where Judge Mathes said, "I am going to look at this." [8]

I think the first thing your Honor should do is to say, "I will look at this in camera, as Judge Mathes did, and see whether or not the resume that is in the file is a fair and an honest one."

The Court: You mean you would place on the Court the duty of going through these FBI files and making the comparison to see whether the resume was fair?

Mr. Tietz: How else would the Court know whether or not our point is good, when we say this resume is unfair?

The Court: If you are going to do that, you might as well change all the regulations and let the judges try the cases de novo.

Mr. Tietz: In part they have to. Any time any one of these registrants comes in and says, "At the personal appearance they called me a yellow so-and-so," that isn't in the file and that evidence has to be gone into.

I have had cases where language like that was used. That may take a whole afternoon of testimony. And Mr. Real and I have had cases where Mr. Real called the board in a week later to rebut it.

You can't confine it to the file itself. There are many elements in these cases.

The Court: All right. Mr. Real, what is your answer to this argument?

Mr. Real: Your Honor, I think the answer is in the White [9] case, where Judge Pope has adopted the theory, and certainly the reasoning, that it would be an almost incongruous situation where the Supreme Court would say on the one hand that you need not put in the FBI reports, and they need not be introduced in evidence, they are of no value, they are certainly of no evidentiary value in a case, and then on the other hand make a decision which opens up the door to the very fact that they were denying in the Nugent case the reports to come into evidence. It would be an incongruous situation if the Supreme Court would have in mind closing one door and opening the other door at the rear where the same thing could be accomplished.

I think certainly the language in the Nugent case, and the language in the White case, indicates that the confidential nature of an FBI report, of the investigative techniques, certainly outweighs the evidentiary value that they might have in a situation of this nature.

They are of no evidentiary value.

The Appeal Board who makes the final determination does not see them. There is nobody that sees them. The defendant has given to him what he must rebut.

We have one further fact in this case that is certainly going to be raised, that the defendant did not appear before the Hearing Officer, and therefore I don't see how under any conceivable theory he can

say that he was prejudiced by a [10] refusal or a denial to see the reports.

The Court: Can that fact be stipulated to here at this time?

Mr. Tietz: Yes.

The Court: That the defendant did not appear?

Mr. Tietz: Is is in the file.

The Court: But the file isn't before me on this motion. For the purpose of this motion can it be stipulated that the defendant did not appear before the Hearing Officer?

Mr. Tietz: Yes. There are extenuating circumstances, which we will go into later, but for the purpose of this motion he did not appear.

The Court: It may be so stipulated?

Mr. Real: It may be so stipulated.

The Court: Is that correct, Mr. Tietz?

Mr. Tietz: Yes, correct.

The Court: Do you consider the White case adverse to your position, Mr. Tietz?

Mr. Tietz: Yes, I do. My first position is on the petition for certiorari. And my second point is that it is not adverse since Clair LaVerne White was processed.

The Court: All right. The subpoena duces tecum —it looks like a subpoena duces tecum to all of these four people.

Mr. Real: Your Honor, as to the hearing Officer Mr. [11] Crotty, there is some information that is probably relevant.

The Court: This looks like a subpoena duces tecum to all of these people.

Mr. Real: To present all of those items, yes, your Honor.

I think it should be quashed as to the special agent of the Federal Bureau of Investigation, as to the United States Attorney, and as to Col. Heartwell. And we have here—and I think Mr. Tietz has gone along with us—that I have all of the correspondence between the defendant and the hearing officer, and that that will be sufficient, that Mr. Crotty need not appear, that all he wanted was the correspondence.

The Court: You don't get my point yet. It is a technical point. Actually, this is drawn up not as a personal subpoena to these individuals, it is drawn up apparently as a subpoena duces tecum to each of them. As a subpoena duces tecum it requires two things: One, that they come; two, that they bring the document.

Mr. Real: That is correct.

The Court: Therefore, you have involved, really, a subpoena duces tecum and a subpoena.

I think they should be quashed as to all of them, unless you want to except Crotty from it, as a subpoena duces tecum. Now, is there any angle involved requiring the personal [12] appearance of Crotty here?

Mr. Real: I think, your Honor, that Mr. Tietz and I can stipulate that I have all of the correspondence between the defendant and Mr. Crotty, and that is what Mr. Tietz wanted, and we have that.

The Court: Can you so stipulate, Mr. Tietz?

Mr. Tietz: Yes.

The Court: And it will be available, Mr. Real?

Mr. Real: Yes, it will be available. I have it right here.

The Court: Then, as far as Homer D. Crotty is concerned, you have no objection to the Court granting the motion to quash?

Mr. Tietz: Let us see if we understand what we are stipulating to.

I believe I am stipulating that if Mr. Crotty were here in person he would testify that these are the original letters he received from the defendant and carbon copies of letters that he personally sent to the defendant.

The Court: Right. By "these" let's make the record clear and mark them Exhibit 1 at this time. This series will be Exhibit 1 for the purpose of this motion. We can also let it have the same number in the trial. Therefore, in view of your statement, which Mr. Real accepts, you have no objection to quashing the subpoena against Homer Crotty? [13]

Mr. Tietz: No.

The Court: All right. Subpoena quashed, then, as to all four.

Mr. Tietz: What about Heartwell, for one thing?

The Court: Did you want him personally?

Mr. Tietz: We have Col. Keeley here as his deputy, in a sense, to testify to something which is pertinent to the case, just as we did in the preceding case.

The Court: Is Mr. Keeley going to be satisfactory, in lieu of Mr. Heartwell?

Mr. Tietz: Oh, yes, yes.

The Court: That raises the question of the indi-

vidual effect of the subpoena duces tecum. I am merely quashing all of the subpoenas duces tecum in view of the stipulation arrived at as to Crotty.

You also indicate that you want the subpoena as to Heartwell treated as an individual subpoena.

Mr. Tietz: Correct.

The Court: He has not come, but Mr. Keeley has come; is that satisfactory to you?

Mr. Tietz: Yes.

The Court: Then there is nothing further to do.

Mr. Real: Mr. McCully is here in lieu of Mr. Malone, who is the special agent in charge. I think the subpoena part of that should also be quashed as to Mr. Malone and [14] his deputy, since I don't think there is any testimony that will be elicited from either Mr. McCully or Mr. Malone. Is that correct, Mr. Tietz?

Mr. Tietz: Other than that it is based on the quashing of a subpoena.

The Court: All right. You are excused, Mr. McCully.

All right. Now, let's go ahead.

Mr. Real: Your Honor, I have here a photostatic copy of the Selective Service file of Nick John Kaline. I ask that it be marked as Government's Exhibit 2 for identification.

The Court: We will mark it as 2.

(The document referred to was marked Plaintiff's Exhibit 2, for identification.)

Mr. Real: I have here a stipulation entered into between the Government and the defendant Nick

John Kaline, signed by the defendant himself, by J. B. Tietz, his counsel, and myself on behalf of the Government, and I ask leave to file the stipulation.

The Court: The stipulation will be approved, and Exhibit 2 will be received in evidence pursuant to the stipulation.

(The document referred to, marked Plaintiff's Exhibit 2, for identification, was received in evidence.)

Mr. Real: The Government rests, your Honor.

Mr. Tietz: The defendant desires to reserve making his [15] motion on the points that are based solely on the Government's file, the Government's evidence, to the end of the case, and the defendant would like to proceed and put on his affirmative defenses.

Col. Keeley, will you please take the stand?

The Court: Mr. Tietz, will you make an opening statement and tell me what your points are in this case so I may have them in mind as we go along?

Mr. Tietz: One point which we expect to establish by Col. Keeley is that there was no hearing officer in the Department of Justice, and that, in connection with the facts of this case, consisted of a denial of due process.

The FBI point has already been disposed of. The Court has taken a position on it.

The no-basis-in-fact point will be strongly urged here. That is the Dickinson case.

We have two points in connection with the Hearing Officer hearing, and one is that the Department

of Justice deprived defendant of his right to a fair and correct recommendation of the Appeal Board in that the Department's recommendation is based on artificial and illegal considerations; and the other is that the undisputed evidence will show that the defendant was deprived of a fair hearing before the Hearing Officer of the Department of Justice, and the conclusions of both the Hearing Officer and the Attorney General are [16] inconsistent with and not supported by the findings of fact.

Now, there are other points in connection with that that I could recite to your Honor, and they are as follows: The Hearing Officer of the Department of Justice abused his discretion when he failed to give defendant another opportunity for a hearing after the defendant had promptly explained why he didn't appear on February 4, 1954, at 3:30 p.m., and after defendant had requested another opportunity to be heard by said Hearing Officer.

And a point in connection with that, but separate, is that the Selective Service system and/or the Department of Justice denied defendant due process of law in that he was not afforded a hearing before a Hearing Officer after February 4, 1954.

I might as well state all my points, so your Honor will know what I am aiming at altogether.

Another point is that the defendant's liability for service was illegally extended beyond age 26.

Another point. Defendant was illegally reclassified from class I-O to class I-A on November 20, 1952. Another point. That he was illegally reclassi-

fied into class I-A-O on December 19, 1952. And, another: That he was illegally deprived of a class IV-D exemption on February 17, 1949.

Most of these points, almost all of them, depend solely on the Government's own exhibit. Two or three will depend [17] in part at least on testimony.

The Court: Proceed.

Mr. Tietz: Colonel, will you please take the stand?

ELIAS M. KEELEY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Elias M. Keeley, K-e-e-l-e-y.

Direct Examination

By Mr. Tietz:

Q. What is your position with Selective Service, Colonel?

A. I am district co-ordinator of District No. 5, which takes in all this area here in Southern California.

Q. Do you have occasion to visit the offices of the Local Boards? A. I do.

Q. Have you had occasion to visit the office of Board 110 at any time since 1950 to the present?

A. I have.

Q. And you are familiar with the bulletin board of that cluster of boards where Board 110 is?

A. I am. [18]

(Testimony of Elias M. Keeley.)

Q. What is that cluster called? Group what?

A. Group D.

Q. How many boards does it have there?

A. I think there are six.

Q. That is the maximum number in any cluster of boards in Los Angeles County, is it not?

A. That is correct.

Q. At any time from 1950 to the present, has this board ever had an advisor to registrants?

A. It has had a Government appeal agent. Is that what you mean?

Q. Oh, no. You are familiar, I am sure, Colonel, with the regulations, particularly Section 1604.41, labeled in big, bold letters, Advisors to Registrants?

A. I am.

Q. Now, that is what I mean. Do they have such a functionary?

A. We do not. That provision provides that in the event you do have advisors under that section, then they should be posted. But where you have other persons who take the place of the advisors, you do not have the technical name, Selective Service Advisor, then it is not necessary that they be posted.

Q. No posting, then?

A. That is correct. [19]

Mr. Tietz: You may cross-examine.

Mr. Real: No cross-examination.

Mr. Tietz: May the Colonel be excused, your Honor? The defendant has no further use for him.

The Court: You may be excused, Colonel.

The Defendant: I will affrm.

NICK JOHN KALINE

the defendant herein, called as a witness in his own behalf, duly affirmed to tell the truth, the whole truth, and nothing but the truth under the pains and penalties of perjury:

The Clerk: What is your name, please?

The Witness: Nick John Kaline.

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case, are you not? A. Yes.

Q. Did you ever get a notification to come before a Hearing Officer of the Department of Justice, a Mr. Crotty? A. Yes, I did.

Q. When did you get that notice?

A. The day I received it was about two or three days after the date of the hearing.

Q. What did you do when you received it? [20]

A. I wrote in within a few days. I consulted my minister, Jack Green, who is in the room, as to what I should do, and he recommended writing in and asking for another hearing, which I did.

The Court: Where does that appear in the file?

The Witness: It is not in the file, I don't think.

The Court: Well, your letter would be.

Mr. Tietz: I had these marked, your Honor, but I just don't have that sheet right in front of me. Pages 38 to 47 cover the chronology of this particular event. Well, I am wrong. Thirty-eight starts with his address before.

(Testimony of Nick John Kaline.)

I am sorry, your Honor.

What was your last answer?

The Witness: I wrote in for another hearing.

Mr. Tietz: May I call on Mr. Real, pursuant to our stipulation, to hand me the correspondence which Mr. Homer Crotty, Hearing Officer of the Department of Justice, sent in? That is known as Exhibit 1?

Mr. Real: That is correct.

The Court: You wrote to the Hearing Officer, not to the draft board?

The Witness: The Hearing Officer, yes.

The Court: All right.

Mr. Tietz: That explains why none of this is in the file, your Honor, because that is Department of Justice material. [21]

Q. (By Mr. Tietz): I am going to put before you a number of sheets of paper, some original letters from Mr. T. Oscar Smith to Mr. Crotty, some carbon copies of Mr. Crotty's letters, others—here is a letter apparently signed by you. Will you look at those, please, and tell us—let me see, are they marked?

The Court: Can't we stipulate that this is the correspondence file of Crotty's office, Mr. Crotty, and the letters signed by Kaline were written by him, and the copies of letters to Kaline were written to him by Crotty, and so forth?

Mr. Real: It may be so stipulated, your Honor.

Mr. Tietz: Yes.

The Court: Let me see them.

(Testimony of Nick John Kaline.)

Mr. Tietz: Will you hand the entire file, Exhibit 1, to the Court?

The Court: Can it be stipulated that the letter from T. Oscar Smith is from an official of the Department of Justice to Homer Crotty, is that right?

Mr. Real: Yes, your Honor, it is so stipulated.

Mr. Tietz: Yes.

The Court: All right.

Q. (By Mr. Tietz): About this time you advised the Local Board by writing to them that you had moved, did you not? A. Yes, I did.

The Court: What page is that? [22]

Mr. Tietz: Pages 43 and 44, your Honor.

The Court: You say "about this time"?

Mr. Tietz: It is dated February 15th.

The Court: Yes, but the dates in the file, Exhibit 1 for identification, indicate that there had been a hearing set for January 21, '54.

Mr. Tietz: Oh, no, your Honor. February something, February 4th.

The Court: The first sheet seems to indicate there had been one set for January 21st.

Mr. Tietz: That may be, and they weren't sure of his address.

The Court: Pardon me. Strike that out. It shows a hearing had been set for February 4th, 1954.

Mr. Tietz: Yes, sir.

The Court: Which is some 11 days prior to this change of address that you refer to.

Mr. Tietz: Yes.

(Testimony of Nick John Kaline.)

The Court: All right.

Q. (By Mr. Tietz): Why didn't you get the notice from Mr. Crotty before you did?

A. Well, I maintain it was my fault because I put the responsibility in my sister's hands, something I shouldn't have done.

Q. What was that? [23]

A. That is, I had moved, and where I was staying, I was single then, where I was staying I knew I wouldn't be there too long, I wasn't happy there, so, rather than go change my driver's license, notify the draft board, and notify every other place of a change of address, I told her that if I had any legal matters, anything of importance, please call me at such and such number.

She called me, but it was about two or three days later, and therefore I say it was my fault, and hers.

Mr. Tietz: I would like to ask a question of this defendant, as I did in the preceding case, your Honor, that goes to his conscientious objections, and I would like to have the same point present in this case.

The Court: You mean the fact that he didn't have an attorney, a trial de novo, and all that business?

Mr. Tietz: Yes.

The Court: Ask your questions.

Mr. Tietz: May it be stipulated that the same point is raised, the same ruling, or shall I ask——

The Court: Ask your preliminary questions about a lawyer.

(Testimony of Nick John Kaline.)

Q. (By Mr. Tietz): What are your conscientious objections to war?

Mr. Real: Your Honor, to which we will object as irrelevant and immaterial to the issues in the case. [24]

The Court: It will be sustained.

Mr. Tietz: If permitted to answer this——

The Court: Are you going to make any showing about a lawyer?

Mr. Tietz: No, I don't think I have to, your Honor. I am unable to do that.

The Court: Make your offer of proof.

Mr. Tietz: If permitted to answer, this witness would give in detail his religious background, his beliefs with respect to a Supreme Being, amplifying what he had placed in special form No. 150, up to his present views, and he would cover the matter of his beliefs with respect to the Supreme Being, with respect to his religious training, with respect to his beliefs.

The Court: In other words, you would want by this witness——

Mr. Tietz: De novo.

The Court: ——to try the question of his classification de novo in this Court?

Mr. Tietz: Yes, sir.

Mr. Real: To which we will object as irrelevant and immaterial.

The Court: Sustained, and the offer of proof is denied.

Mr. Tietz: You may cross-examine. [25]

(Testimony of Nick John Kaline.)

Cross-Examination

By Mr. Real:

Q. Mr. Kaline, did you ever make a request of the Local Board for assistance in the filling out of your questionnaire? A. Not that I recall.

Q. Or in the filling out of your special form for conscientious objector, that is the long form about your conscientious objection?

A. Not the draft board. My minister.

Q. You didn't ask the draft board for any assistance? A. No.

Q. I think you said that it was your own fault that you didn't notify the board of your change of address?

A. I take the blame is the way I put it.

Q. And that was because you had moved and had not notified them?

A. Yes. I placed the responsibility on someone else.

Mr. Real: I have nothing further, your Honor.

Mr. Tietz: That is our case, your Honor.

The Court: Step down. You are excused.

Mr. Tietz: I would like a fair amount of time to argue these points, because I think they are ones that can only be understood, as I think they should be understood, with enough argument on them. [26]

The first one I want to argue is that the Hearing Officer of the Department of Justice abused his discretion in not giving this defendant another opportunity——

The Court: I don't want to hear any argument on that. The Hearing Officer procedure is for the benefit of the defendant; if he wants to avail himself of it, he should keep the draft board familiar with his address.

Mr. Tietz: I have a few cases which are decisions of this very Court.

The Court: Do you want to file them in a brief?

Mr. Tietz: I can do that.

The Court: I don't think there is much to the point; I will read the point, but make it short.

What is your next point?

Mr. Tietz: In similar matters courts have held hearings of this sort given to the defendant are very important.

The Court: Sure, but what is the draft board to do? Take an extreme case. Suppose the draft board doesn't get this change of address, does the draft board have to go out and find him and bring him in before they can process his file?

Mr. Tietz: No. I think there must be a reasonable view of it. If he makes a diligent attempt, if he gets it in fairly promptly, he should have a chance to come before the Hearing Officer. [27]

When one looks at the file, you will see that even the draft board thought so, when you look at the file you will see that they started to give him another date. An inspection of the file will show that.

The Court: You set it forth in the brief.

What other point do you have?

Mr. Tietz: My next point is that he had his liability illegally extended beyond the age of 26.

Pages 7, 13, 14, 15 of the file tend to support my claim.

Your Honor is familiar with the regulation that says—it has always been a regulation—that a registrant should be classified in the lowest classification as to which he presents evidence.

It was evident that back in 1949 he presented evidence that at that time he was entitled to a 4-D ministerial student classification. He was full-time student in the Pacific Bible College. Now, instead of putting him in the 4-D exempt classification, they put him in the 4-F deferred classification, and that act extended his liability to the age of 35. If they had properly classified him as soon as——

The Court: Did he take an appeal from that?

Mr. Tietz: No. And my next point is that you can't take an appeal from a 4-F, and I will give the Court the regulations, and I will give the Court an interpretation of Selective Service itself on that. [28]

The Court: You had better develop this point in your brief, too.

Mr. Tietz: All right.

Then my next point is that he was illegally classified from Class I-O to Class I-A on November 20, 1952.

The Court: What page is that? Or is it only on the summary sheet?

Mr. Tietz: The summary sheet shows what they did, but there is no basis in fact for a change or for reclassification. The summary sheet, the initial minutes of action on page 11 indicate that they just

went ahead and did it. It doesn't show any basis at all for going ahead and doing it.

Now, the intervening things afford no basis whatsoever that he was physically acceptable. That doesn't mean that they can take him out of I-O. He has to be in good physical shape to do the I-O work. There is nothing in there that affords a basis in fact for the change from March 1st, 1952, to November 20, 1952, I-A.

I heard an argument on a similar point this morning. I have got some cases which your Honor might wish to review, which indicate that they can't change without facts intervening. I have got four cases on the point.

The Court: All right. You set them forth in your brief and I will look at them.

What is your next point? [29]

Mr. Tietz: My next point is that he was illegally classified into Class 1-A-O December 19, 1952. My argument there is that all this evidence was that he was a conscientious objector, and they just pick out this 1-A-O as a sort of bargaining thing and give it to him to see if he will take it.

There is no evidence to support the 1-A-O. The evidence was on the 1-O.

The Court: You can develop that. I think you had better develop the whole matter by brief, because you will have to make references to the exhibit, to the file, and the Government will want a chance to answer your contentions.

Do you offer Exhibit 1 in evidence, Mr. Real? I thought we stipulated on that.

Mr. Real: I will ask that the Government be able to withdraw Government's Exhibit 1, and have some photos made of Government's Exhibit 1, so we can return it to Mr. Crotty's file.

Mr. Tietz: No objection.

The Court: You may do that, and then substitute it.

(The document referred to, marked Plaintiff's Exhibit 1, for identification, was received in evidence.)

The Court: Did you make a motion for judgment of acquittal?

Mr. Tietz: Yes. [30]

The Clerk: There has been no motion made yet in the record.

The Court: You didn't make one; you told me what your points were.

May it be stipulated that at the conclusion of your case, the Government's case and your case, you make the motion for judgment of acquittal upon all the grounds that you set forth?

Mr. Tietz: Yes. Will the Government so stipulate?

Mr. Real: Yes, it may be so stipulated.

The Court: Somewhere along the line you have rested, I take it.

Mr. Tietz: Yes.

The Court: All right.

I will give you the same period of time in this case that I gave you in the other one. You file your

By the way, if this case goes up on appeal I want my remarks stated for the benefit of the Circuit.

Now, in a recent case, and I couldn't find it to give you the name of it, but you have probably seen it, Judge Stephens has held that where there was an error in a classification involving a previous classification, which had the effect of extending the matter beyond the particular age involved, that that matter could be inquired into. You probably know the name of the case, Mr. Tietz.

Mr. Tietz: Talcott. A habeas corpus case.

The Court: It just came down recently.

Mr. Tietz: I believe my case of Talcott was the one.

The Court: So the question is, was there error in classifying this defendant IV-F, as he was classified, I think, in February of 1949?

Now, at that time there was a regulation. I don't have the number of it, but it is very similar to 1623.2, the present regulation, which required the board to start at the bottom and consider each classification. Defendant claims that he was entitled to a classification of——

Mr. Tietz: IV-D.

The Court: ——IV-D, on the basis of being a student for [35] the ministry.

Mr. Tietz: Full-time student, yes, sir.

The Court: There was evidence in the file, first in one of the documents filed by the registrant, that he had been rejected by the Air Corps for some physical condition, which was confirmed by the sheet that came in that is now page 13 of the file.

There was, therefore, sufficient evidence—there was a basis in fact for the board to have given him the class IV-F, and therefore never reached the classification IV-D. The registrant claims there was not such sufficient basis in fact and talks about the board should have sent him for an examination, and that sort of thing. But the court finds that that point is not good; that there was a basis in fact, and that the defendant registrant acquiesced in that classification. There is no appeal from it.

Secondly, the file went to the Hearing Officer of the Department of Justice for a hearing and advisory recommendation. The defendant did not keep in touch with his draft board. He testified in this court that it was his own fault. He neglected to tell the board where he could be reached. So when the notice was sent for him to appear for this hearing he didn't get the notice.

The court thinks it is entirely within the discretion of the board, within the purview of the law, that the hearing go on in his absence, and the Hearing Officer did consider [36] those matters that were in the file. The Hearing Officer found—this man, incidentally, was classified I-A-O, as a noncombatant who was opposed to taking human life, but was eligible to serve in the Armed Forces, and his violation concerns refusal to accept orders to appear for induction for those purposes. The defendant argues there is no evidence in the draft board file that this man was willing to do noncombatant activities or work required of a registrant in I-A-O. I don't so read the draft board file. The man was employed in

a defense plant, a plant that had, if I recall, contracts with the Air Force. The Hearing Officer's report says—page 49—"It also appear that registrant was working on material on a sub-contract for the Air Force and Navy. A plant official expressed the belief that the registrant was aware of the nature of this work."

Whether the plant official so expressed the view, or not, I think it is obvious that anybody that has any practical experience at all of how defense contracts are worked out, that no man could work on one of those contracts without knowing that he was working on a Government contract. The job orders go around that it is a Government contract, and it is generally indicated all over the place. And the inference is clear that the defendant knew he was performing that kind of work. If he, therefore, was willing to work on those jobs, assuming that he was conscientiously opposed to taking human [37] life, it seems to me it was proper to classify him I-A-O and order him inducted into the Army as a noncombatant. And that is what was done, and I find a basis in fact and no error.

Do you have any comments, Mr. Tietz?

Mr. Tietz: I haven't heard the court make a comment on the third point.

The Court: What point is that?

Mr. Tietz: Reclassified from class I-O to class I-A.

The Court: I can't see that that point had anything to do with it at all. It is something that hap-

pened in the past. At one time he had been classified I-O, and it went ahead and the board classified him I-A; that thereafter other classifications came along and superseded that. The Government is not relying for this prosecution on that classification. There is no showing that that change from I-O to I-A in any way has any bearing on the present classification of I-A-O.

Mr. Tietz: This could be said on that point:——

I don't recall now whether I did spell it out in my brief, my two briefs.

A registrant is entitled to a fair deal at every step of the proceeding. Now, if he had stayed in the I-O for but a little longer, he would have been confronted with the processing that they were all being given then. It is a matter that [38] the court can take judicial notice of, of being offered the opportunity to take certain civilian jobs. Then he could have been in civilian work, which is what he wanted. But he was taken out of that, as I say, illegally. If he was taken out of there illegally, then he has been prejudiced.

The Court: I don't follow you on that. Supposing a man, however, was not given a fair deal by a board, that somewhere in the past they make an erroneous classification, and later on he then is properly classified, is that going to taint all the proceedings thereafter? Are we going to have to take the Selective Service file out and burn up everything that went on before, start all over again and reregister the man?

It seems to me if you show any procedural error.

you have got to show some causal connection between that error and the man's present situation of being a defendant here in the courtroom. And I don't find that connection.

Mr. Tietz: I argued a moment ago that he was prejudiced in the way that I described. That is a problem that has confronted the Ninth Circuit indirectly in this way: it has been argued many times by the various United States Attorneys that the final classification supersedes all the preceding classifications and cures all the defects.

Well, the first half of that is unquestionably true.

The Court: I understand the law there, and I agree [39] there are situations. Supposing a man asks for a personal appearance and never gets it, obviously the succeeding classification would not cure that procedural error. But if somewhere along the line he was given his personal hearing and then was classified, then the fact that previously in the file he had asked for a personal hearing and didn't get it is out the window. There is no causal connection between the present classification resulting from the personal hearing and the previous one that was affected with the procedural error. But I can't see here that because he may have been classified one way or the other sometime in the past, and thereafter another classification is made, that it can mean anything but we must look to the other classifications and see if they hold up.

Mr. Tietz: It seems to me that same reasoning could apply to the first point I made, that he was classified IV-F without a basis in fact, because he

hadn't been given any physical examination. As soon as he was given a physical examination it showed he shouldn't have been in IV-F. If I was right on that, which the court found I wasn't, because the court believes there was a basis for the 1945 finding.

The Court: And the defendant's statement.

Mr. Tietz: It is all very much in the past. The board should concern itself, and the law charges them to concern themselves with the current status. If I had been right on [40] that, then I still wouldn't be able to use it, according to the present reasoning, because he had been classified later in I-A-O, which——

The Court: No. That would come within this exception. I think you mentioned the Talbot case, or whatever it was, Talcott, or Talbot.

Mr. Tietz: Talcott.

The Court: There if you could show the action by the board had the effect of extending the period of time in which he might be eligible for the draft, or something like that, you would have a causal connection. If your point is good on that first matter about the 4-F classification, then I am convinced under the case that we have just referred to that his period of eligibility for service was extended, and therefore there had been error. But I am not convinced of the first premise, namely, that there was anything wrong in the classification.

Mr. Tietz: Did the court give any weight to the argument that I made that he couldn't appeal from the IV-F, and therefore he was stuck with it im-

properly, without an examination? If he could have appealed and didn't appeal, then he would be at fault. Not being able to appeal for the IV-D I think it puts him in the same position where Talcott was.

The Court: Well, I don't agree. I think there was a basis in fact, and that is all I am required to look to. The [41] board obeyed orders and they started in with the bottom classification, and when they got to IV-F they thought he belonged there and put him in there. I think they had that right. Subsequently when there was more information before the board a different action was taken. From what they had before them I think they had a basis in fact.

The court finds the defendant guilty and waives the probation report.

Is there any reason why the defendant should not be immediately sentenced?

Mr. Tietz: I will repeat, without going into the words of the application I made for the previous defendant, and ask for one week's continuance for the purpose of sentencing.

The Court: How long has this been pending? It was back in February, 1949.

Mr. Tietz: The defendant has whispered to me that it might be said to date back to 1945, because he was a registrant in the last war.

The summary of the minutes, though, doesn't contain the least bit of delay, through either litigation——

The Court: No, I don't find it here. Apparently

his first order to report for induction was in '54. Is that right?

Mr. Tietz: I believe so.

The Court: I will put the matter over, if you want, one [42] week, to December 20th, at 2:00 o'clock for sentence.

Mr. Tietz: Yes, sir.

The Court: Also be prepared, as in the other case, to give a concise statement of what you contend to be the precise question of law, if you make an application for bail. The 20th at 2:00 o'clock.

Just because I don't agree with your position doesn't mean that you haven't done an able job in analyzing this file and preparing your record and preserving your record. That is probably small consolation to you.

Mr. Tietz: I would think that your Honor might express now, after having read these comparatively lengthy briefs, whether your Honor at this stage believes that there are substantial points that would justify an Appellate decision.

The Court: I doubt it.

Mr. Tietz: I will be ready, then, if the defendants desire.

The Court: He may remain on bond.

(Whereupon the hearing in the above-entitled matter was continued to December 20, 1954, at 2:00 o'clock p.m.) [43]

Monday, December 20, 1954, 2:00 P.M.

(Other court matters.)

The Clerk: No. 29 on the calendar. 23911 Criminal, United States v. Nick John Kaline, for hearing motion for judgment of acquittal and for a new trial, and for sentencing.

The Court: The record will show the defendant present with his counsel.

This is another Selective Service case in which I waived a probation report. This defendant was classified as I-A-O, available for noncombatant service in the Armed Forces. Mr. Tietz has filed a renewal of a motion for judgment of acquittal, and an alternate motion for a new trial.

Mr. Tietz: Your Honor, on the motion for new trial I have certain things to say that might sit well with your Honor, in that I will be commenting on some cases that weren't available.

(At this point there was further discussion between court and counsel, which discussion was reported by the court reporter, but not transcribed at the request of counsel.)

Mr. Tietz: The main thing I am trying to do is establish that there is a reasonable ground for my argument, and if the court should feel that there is a point here that the Court [45] of Appeals should decide, then I won't have to repeat it.

The Court: I don't think there is. Motion for judgment of acquittal and motion for a new trial are denied.

Do you have a notice of appeal ready?

Mr. Tietz: Yes, sir.

The Court: Is the defendant ready for sentence?

Mr. Tietz: Yes, he is. Well, I would like to be heard.

The Court: I have waived a probation report in this matter.

Mr. Tietz: May I be heard before your Honor passes sentence?

The Court: Yes.

Mr. Tietz: I am not going to repeat the arguments that I made in the past, years ago or just a few minutes ago, but I do have some things to say about this particular defendant that makes him different from the others. There is a good reason in his file why he particularly should have a chance by this court, as a condition of probation, to do I-O work, and then there is also a good personal——

The Court: Mr. Kaline, would you go into the Army as a private and perform noncombatant work pursuant to this order that you got from your Local Board?

The Defendant: No, your Honor.

The Court: I am not going to talk about other classifications. I can't change a draft board's classification. [46] This board gave him I-A-O, noncombatant under military direction. He said he wouldn't do it even if we gave him a chance now, so why talk about what will happen under a I-O classification?

Mr. Tietz: Only for this reason. The Local Board gave him on two occasions—gave him the I-O. He should have a chance to do I-O work. That is

the only reason. I didn't make this argument in the first case because that was an I-A case. But this man had been given it, and I argued during the trial—I won't repeat it—that it was taken away from him illegally. Here is a fellow that should for that reason be given a chance by the court to do it.

I might add that there is a personal reason why your Honor should give a little weight to it. His wife is in her six and a half month of pregnancy. Once before she lost a child.

This was told me not by him, but his minister who is sitting in court here today. She is an orphan. He is holding two jobs now, a regular job and a parking lot job. If your Honor gave him the chance to do I-O work he would do the I-O work. He would supplement his income, because that is only about two hundred a month. They run from $180 to $210, depending on the place. He would keep on with his second job. He is able to do it. He has got the physique for it. He would keep his wife off relief, the country would get some [47] good out of him, and he had that classification.

He isn't a I-A-O type; he is the I-O type. I think this is one case where your Honor should consider a probationary sentence.

The Court: Mr. Tietz, I have been over this file, and I can't disregard the classification that has been given. It is not my job to supplant the draft board's classification with my own judgment.

Mr. Tietz: There is a manifest injustice. The court found him guilty. The court calls them as he sees them. But this is another matter. What is to

be done to this fellow with relation to society and his family? A probationary sentence, just like in the cases of these other fellows who committed all sorts of offenses. It is better to have them out working——

The Court: We don't cross the bridge of what would happen if he got an I-O classification. I don't want to go into it. I don't know what would happen. Maybe he would work and maybe he wouldn't.

I have had them up here classified I-O and they came in the same way.

Mr. Tietz: Exactly, and they are different. I think the court could do this: The court could give him a five-year penitentiary sentence, and if he didn't do his work, didn't do this civilian work as directed, he would be right back. [48]

The Court: That is putting me in the place of sitting on the draft board as an appeal agent overruling their decision.

Mr. Tietz: Every judge of this court during the hot part of World War II did it. Your Honor did it in one case.

The Court: I am ready to pass sentence.

Mr. Tietz: We have no legal reason why sentence shouldn't be pronounced at this time.

The Court: It is the judgment of the court that the defendant be sentenced to the custody of the Attorney General for imprisonment for the period of four years.

Do you have a notice of appeal to file?

Mr. Tietz: Yes, sir. I am also filing with the

clerk, your Honor, in duplicate an application for bail on appeal.

The Court: Is your application for bail on appeal based on the same grounds as the matters heretofore discussed at the trial and on the motion for judgment of acquittal, and motion for new trial?

Mr. Tietz: Yes. And upon my further statement that I, as his counsel, feel that he has good grounds for taking the appeal, and a good chance to interest the Court of Appeals.

The Court: All the grounds that you urged at the trial in the motion, and on the motion for a new trial, and the motion for judgment of acquittal may be considered as having been urged. [49]

Mr. Tietz: Merely as a point of substantial basis. I don't disagree with your Honor, no, your Honor made a decision, but I am saying that there is a substantial basis for letting him go to the Court of Appeals to have them decide and pass judgment on whether your Honor is correct or not.

The Court: Motion for bail on appeal is denied.

Mr. Tietz: May he have a——

The Court: Bail exonerated and the defendant remanded to custody.

Mr. Tietz: I was going to ask that he have a few days, anyway, to discuss the possibilities of appeal with me.

The Court: Mr. Tietz, this matter came up for sentence, if I recall, a week ago, and I put it over a week at your request. Is that right?

Mr. Tietz: Correct.

The Court: All right.

Mr. Tietz: It is a request. I have no right to insist on it.

The Court: All right. Bond exonerated; the defendant committed.

[Endorsed]: Filed December 31, 1954. [50]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 17, inclusive, contain the original Indictment; Stipulation; Motion for Judgment of Acquittal; Renewal of Motion for Judgment of Acquittal; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of Minutes of the Court for November 15 and December 20, 1954, which, together with the reporter's transcript and the original exhibits, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29th day of December, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14635. United States Court of Appeals for the Ninth Circuit. Nick John Kaline, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 3, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals
for the Ninth Circuit

No. 14635

At a Stated Term, to wit: The October Term, 1954, of the United States Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City of Los Angeles, in the State of California, on Monday the third day of January, in the year of our Lord one thousand nine hundred and fifty-five.

Present: Honorable Albert Lee Stephens, Circuit Judge, Presiding;

Honorable James Alger Fee,
Circuit Judge;

Honorable Richard H. Chambers,
Circuit Judge.

NICK JOHN KALINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER SUBMITTING AND DENYING MOTION FOR BAIL

Ordered motion of Appellant for admission to bail pending appeal presented by Mr. J. B. Tietz, counsel for the Appellant, and by Mr. Cecil Hicks,

Jr., Assistant U. S. Attorney, counsel for the Appellee in opposition thereto, and submitted to the court for consideration and decision.

Upon consideration thereof, It Is Further Ordered that said motion be, and hereby is denied.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

Defendant's liability for service has illegally extended beyond age 26 on February 17, 1949, and he was illegally deprived of a Class IV-D "Exempt" Classification on said date.

II.

The Classification of I-A-O given the defendant by the appeal board was contrary to law and without basis in fact.

III.

Since the regulations forbade defendant the benefit of counsel at his appearance before local board on December 19, 1952, the defendant was entitled in this court, to a trial de novo on the issues of the claimed classifications.

IV.

Defendant was denied due process in that the local board failed to have available an advisor to registrants and to have posted conspicuously or any place, the names and addresses of such advisor, as required by the regulations, and to the defendant's prejudice.

V.

The Department of Justice deprived defendant of his right to a fair and correct recommendation to the appeal board in that the department's recommendation was based on artificial and illegal considerations.

VI.

The Hearing Officer of the Department of Justice abused his discretion when he failed to give defendant another opportunity for a hearing after defendant had promptly explained why he didn't appear on February 4, 1954, at 3:30 p.m., and after defendant had requested another opportunity to be heard by said Hearing Officer.

VII.

The undisputed evidence shows that the defendant was deprived of a fair hearing before the hearing officer of the Department of Justice in that the conclusions of both the Hearing Officer and the Attorney General are inconsistent with and not supported by the findings of fact.

VIII.

The failure of the court to compel the production of the F.B.I. investigative report and the report of

Hearing Officer to the Attorney General and the order of the court sustaining the motion to quash the subpoena duces tecum made by the Government, constitute a deprivation of the defendant's rights to due process of law upon criminal trials contrary to the Fifth Amendment to the United States Constitution and the right to confrontation guaranteed by the Sixth Amendment, and also violate the statutes and rules of the court providing for the issuance of subpoenas in behalf of defendants in criminal cases.

IX.

The denial of the conscientious objector status by the Selective Service System and the recommendation by the Hearing Officer of the Department of Justice and by the Department of Justice to the board of appeal were without basis in fact, arbitrary, capricious and contrary to law.

/s/ J. B. TIETZ.

[Endorsed]: Filed February 1, 1955.

No. 14635

In the
United States Court of Appeals
For the Ninth Circuit

NICK JOHN KALINE,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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In the
United States Court of Appeals
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NICK JOHN KALINE, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14635

Appellant's Opening Brief

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of four years. [R 12-13]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 14]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction. [R 3]

Appellant pleaded Not Guilty, waived jury trial and was tried on November 23, 1954. [R 5] Appellant was convicted by Judge James M. Carter on December 13, 1954 [R 9-10] and sentenced on December 20, 1954. [R 11-12]

At the close of the evidence, a Motion for Judgment of Acquittal was made, argued and denied [R 7-10]; the motion was renewed on December 20th, and denied and at the same time a Motion for New Trial was made and denied. [R 10-12]

THE FACTS

Appellant registered with Local Board No. 110 on September 8, 1948. [Ex 1-2]* He filed his 8-page Classification Questionnaire on December 13, 1948. [Ex 4-12] In it he showed he was a student at Pacific Bible College preparing for the ministry of the Pilgrim Holiness Church. [Ex 6, 9] He stated he had no physical or mental condition that would disqualify him from service in the Armed Forces. [Ex 10] However, when he registered, he had shown he had been rejected by the Armed Forces in 1945. [Ex 1] On January 4, 1949 a reply was received by the local board, from the Records Section of the Selective Service Sys-

*Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

tem, showing that the reason for the 1945 rejection was "valvular heart disease." [Ex 13]

On the said January 4, 1949 the local board wrote appellant he should file a letter from the Pacific Bible College corroborating his claim to a divinity student status. [Ex 14] Although he promptly procured such a letter [Ex 15] and although no effort was made to give him a physical exam or to otherwise rebut his claim that he was currently in good health he was classified in Class IV-F (unfit). By virtue of a 1951 change in the law being in this classification extended his liability to age 35.

On December 18, 1951 he was reclassified in I-A and *thereafter* given a physical exam which revealed his current condition was good. [Ex 11]

Since he had previously asked for the Special Form for Conscientious Objectors, it [Ex 19-22] was sent him on January 10, 1952, and upon its return, he was reclassified in Class I-O, on March 1, 1952. [Ex 11]

On October 20, 1952, he was mailed a form on which to volunteer for civilian work [Ex 24] and upon his failure to volunteer (rather than await his turn) he was reclassified in Class I-A.

He was notified of said reclassification and, upon his timely complaint [Ex 25] he was ordered to appear before the local board [Ex 11] and after the hearing was reclassified in Class I-A-O (non-combatant). He complained again and the file was sent to the Appeal Board.

The Appeal Board retained him in said I-A-O classification.

During the trial, the following transpired:

1. Defendant's subpoena duces tecum [Hearing Officer and FBI reports] was quashed. [R. 26]
2. The Government introduced the selective service file as its sole evidence. [R. 28]

QUESTIONS PRESENTED AND HOW RAISED

I.

Concerning Advisors to Registrants: the evidence showed that the names and addresses of Advisors to Registrants were not posted on the bulletin board, and, in fact, the board had no Advisors to Registrants. There was also testimony that he was prejudiced by having no Advisor.

The question presented may have two parts: first, is the failure of the local board to comply with the regulations, mandatorily requiring such action, in itself a denial of due process; second, if a showing of prejudice is required, did appellant's evidence meet the requirements?

This, and all subsequent questions, were raised by Motion for Judgment of Acquittal.

II.

Concerning failure of proof of crime: the evidence showed that appellant had not been afforded an oppor-

tunity to go through with the induction ceremony, that is, to refuse to "step forward" after being warned of the penalty.

The question presented, appellant submits, is precisely that considered and decided in *Chernekoff v. United States,* ..... F2 ....., (9 Cir., No. 14370, decided Feb. 24, 1955).

III.

Concerned the Hearing Officer hearing: the evidence showed:

A. No copy of this officer's report to the Department was ever placed in the file or sent appellant;

B. No copy of the Department's recommendation was placed in the file until after the Appeal Board's decision.

C. The conclusions in the above documents are inconsistent with and are not supported by the findings of fact and also are based on artificial considerations.

D. The Hearing Officer should have given appellant a second chance for a hearing.

E. The trial court erred in quashing the subpoena; at least as *in camera* inspection should have been made to compare the FBI report with the Hearing Officer's report.

The question raised is any of the above, individually or collectively to be considered a denial of due process?

IV.

Concerning extension of liability: appellant was given as unrequested IV-F classification, without physical examination, and contrary to the evidence of his current good health and was simultaneously denied a minister's classification although his evidence for it was prima facie good and unrebutted.

The question raised is: on such a set of facts may a minister's classification be denied and may an "unfit" classification be imposed?

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motions for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT ONE

It is a denial of due process for a local board to fail to have Advisors to Registrants.

Chernekoff vs. United States, supra.

If a showing of prejudice is needed this appellant's evidence met the test.

POINT TWO

There is a failure of proof of the crime charged.

Chernekoff, supra is squarely in point.

POINT THREE

The facts surrounding the Hearing Officer hearing reveal five denials of due process. The Supreme Court recently disposed of two of the sub-points in accord with appellant's position in *Gonzales* and of another in *Simmons;* this Court may choose to also rule on the remaining point.

POINT FOUR

Appellant's liability beyond age 26 was illegally extended; concurrently, he was illegally denied an exempt classification.

ARGUMENT

POINT I.

DEFENDANT WAS DENIED DUE PROCESS IN THAT THE LOCAL BOARD FAILED TO HAVE AVAILABLE AN ADVISOR TO REGISTRANTS AND TO HAVE POSTED CONSPICUOUSLY OR ANY PLACE, THE NAMES AND ADDRESSES OF SUCH ADVISOR, AS REQUIRED BY THE REGULATIONS, AND TO THE DEFENDANT'S PREJUDICE.

Lt. Col. Keeley testified that the local board never posted the names and addresses of Advisors to Registrants on its bulletin board, and in fact, never had any. [R. 31]

Section 1604.41 of the Selective Service Regulations, at all times, up to January 31, 1955, has been:

> ADVISORS TO REGISTRANTS
>
> 1604.41 APPOINTMENT AND DUTIES—Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service form and to advise registrants on other matters relating to their liabilities under the Selective Service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

Had there been an Advisor's name and address posted, Kaline could have gone to him, learned that he could inspect his file, there discovered that the Appeal Board was trying to get him a new date and, with the advice of the Advisor, pushed the matter to success. See page 45 of the Exhibit showing that the Appeal Board did make a second attempt, on February 17, 1954, to get him another Hearing before the Hearing Officer after he had failed to appear on the 4th. This Court indicated in *Chernekoff supra* that the failure to comply with the regulations itself presents a serious question. At least one trial court has held that the failure of the board to have an Advisor, coupled with a showing that the defendant was in some way injured by the board's failure, required an acquittal.

Such was the holding of Judge Peirson Hall in *United States vs. Kariakin,* No. 23223, S. D. California, January 12, 1954:

> "MR. TIETZ: Your Honor has heard me on all the materials that I wish to present.
>
> THE COURT: Very well.
>
> I am inclined to think that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.
>
> MR. TIETZ: Yes, sir.
>
> THE COURT: I do not know that it could be so classified as a defective notice because I do not know that they are required by any regulation to give a notice which includes that.

MR. TIETZ: But they do. That is what I was trying to establish.

THE COURT: They do that as a matter of practice and it is not—in other words. I do not think the practice can result in the creation of right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never adviser that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognized that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect and he should be and is acquitted, and his bond is exonerated.

MR. TIETZ: Thank you."

On January 31, 1955, the regulation was amended by E. O. 10594 and the mandatory nature of the requirement was made permissive. This implied admission should be considered by the Court to require reversal regardless of any specific evidence that appellant was prejudiced. To paraphrase what the Supreme

Court said in *Simmons v. United States,* ..... U. S. ....., No. 251, decided March 14, 1955 with respect to another denial of due process: Appellant has been deprived of a fundamental safe-guard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation.

POINT II.

THERE WAS NO PROOF OF THE CRIME CHARGED IN THAT THERE WAS NO PROOF APPELLANT HAD BEEN WARNED OF THE PENALTY FOR REFUSAL TO SUBMIT TO INDUCTION AND THEREAFTER GIVEN THE OPPORTUNITY TO "STEP FORWARD."

The evidence in this case is identical (except for the name of selectee and the date of the abortive induction ceremony) with that in the case of *Chernekoff vs. United States, supra.* See pages 57 and 58 of the Exhibit.

It is submitted that the Chernekoff decision is dispositive of this point.

POINT III.

THE CIRCUMSTANCES CONNECTED WITH THE PART PLAYED BY THE HEARING OFFICER IN THE ADMINISTRATIVE APPEAL, REVEAL ONE OR MORE DENIALS OF DUE PROCESS.

A. No copy of this officer's report to the Department was ever placed in the file or sent appellant.

This failure to afford registrants an opportunity to rebute adverse evidence, and conclusions of the hearing officer is the result of two things: (1) the absence of a selective service regulation requiring that the registrant be given such an opportunity and (2) the policy of the Department of Justice not to give the registrant copies. This situation was recently considered by the Supreme Court and it declared invalid the procedure of the Department in deciding conscientious objector cases. It held that the above procedure constituted a denial of due process.

It is submitted that *Gonzales vs. United States,* ..... U. S. ....., No. 69, decided March 14, 1955, is dispositive of the question.

B. No. copy of the Department's recommendation was placed in the file until after the Appeal Board's decision.

The comments on "A", above, apply equally to this point.

C. The conclusions in the above two documents are inconsistent with and are not supported by the

findings of fact and also are based on artificial considerations.

Page 49 of the Exhibit shows that the machine shop work of the defendant on "government subcontracts" was considered adverse by the Attorney General, and, we can presume, by the Appeal Board.

Nothing whatever is said in the Act or the Regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form even though he was willing to perform secular defense work as a means of employment. If the unreasonable interpretation placed upon the act is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who had conscientious objections based on religious grounds to participation in war in any form. Congress did not make the factors relied upon in this case as any basis in fact for the denial of the conscientious objector claim.

Neither the Act nor the Regulations make the type of work that a person does a criterion to follow in the determination of his conscientious objections. The sole questions for determination of conscientious objections are (1) does the person object to participation in the armed forces as a soldier? (2) Does he believe in the Supreme Being? (3) Does this belief carry with it obligations to God higher than those owed to the state? (4) Does his belief originate from a belief in the Supreme Being and not from a political, sociological, philosophical or personal moral code?

Kaline's case commands affirmative answers to all these questions. He fits the statutory definition of a conscientious objector.

It is entirely irrelevant and immaterial to hold that there was basis in fact because Kaline was willing to work in a steel plant. This was not an element to consider and in any event it was no basis in fact according to the law for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form, all of which was corroborated by the FBI report. *The law does not authorize the draft boards to invent fictitious and foreign standards and use them* to speculate against evidence and facts that are undisputed.—*Annett vs. United States,* 205 F. 2d 689 (10th Cir.); *United States vs.*

Alvies, 112 F. Supp. 618 (N.D. Cal. S.D. 1953); *United States vs. Graham,* 109 F. Supp. 377 (W.D.Ky. 1952); *United States vs. Everngam,* 102 F. Supp. 128 (D. W. Va. 1951).

D. The Hearing Officer should have given appellant a second chance for a hearing.

(1) There are two arguments in this point. The first argument is based on the fact that appellant received his invitation from the Hearing Officer several days late but promptly asked for a second chance. [R. 32-33] It was an abuse of discretion for the Hearing Officer to not give the defendant a new date for the hearing that Congress provided. This hearing is the chief check provided by Congress to avoid local prejudices. When a registrant promptly points out to the Hearing Officer that he received his mail late, it is more than courtesy to give him another chance; fair dealing requires it. Two courts have so held in similar situations. On May 15, 1953, in the Southern District of California Chief Judge Yankwich held, in *United States vs. Waterfield,* No. 3143-ND:

> "THE COURT: Gentlemen, I think this man was not given due process. I do not believe, when a man makes a request, that a Board can send a letter and then, when notified by the defendant's mother that he is away temporarily, just say "We won't give you another date."
>
> Obviously, the law does not require the man to hold himself at military attention and salute

the moment he asks for a personal interview. He has a right to be treated as reasonable human beings are. This man asked for a personal interview. The letter from the Board reached his home while he was out of town. It is not required for a man, when he has been classified by a Board, to remain in town at the Board's beck and call. The Board should be reasonable about it.

In this particular case, supposing the man's mother had not lived there, and the letter had reached his home while he was gone? You couldn't put him in default when the man hasn't received the letter. As a matter of fact, in law we allow three days extra service by mail, on the presumption it might be delayed; but this man's mother opened the letter, and she called up, and the Secretary of the Board wrote down, "The mother says he is out of town." Then when he came back, he went down immediately, and they said, "It is too bad, you are too late." In the meantime they had written, "Request for another hearing, oral, denied. The registrant did not appear."

They knew why he didn't appear. That is not a frank statement. In typewriting, on page 35 of the record, appears:

> "Jack Howard Waterfield, 4-79-31-58
>
> November 3, 1952
>
> Jack Howard Waterfield's mother called and said that he is out of town and would not be in today. Would like another appointment for next Monday.
>
> I told her that I would put it up before the local board."

In spite of that, she writes below,

"Registrant did not appear 11/3/52."

He wasn't there; he hadn't received the notice. He had been out of town.

"Request for another appearance denied."

So they denied it arbitrarily, depriving him of the right of appeal, and that is not due process.

I find the defendant not guilty, as the only method of correcting an injustice. This man was entitled to a personal appearance, and he did not get it, and they had no right to say he had to stay around. That is not due process, as I understand, so the man is found not guilty.

MR. TIETZ: Bond exonerated, your Honor?

THE COURT: Bond exonerated."

On August 5, 1954, in the Southern District of California, the late Judge Beaumont held, in *United States vs. Williams,* No. 3230-ND:

"MR. KWAN: In this case, your Honor, he has been given the full requirements of the selective service system in so far as appearance before the draft board.

MR. TIETZ: We dispute that. He asked for a personal appearance, and he didn't get his mail, and he begged for another chance. 'Give me another date', he said.

THE COURT: I am interested in that phase, Mr. Tietz. What was the testimony in regard to his asking for another chance here?

MR. TIETZ: It is written, your Honor; it is in the file. I will be able to turn to it in a moment, I think. Page 32. Page 36 is their denial.

THE COURT: Page 32, is it? Well, read it.

MR. TIETZ: 'Local Board No. 70, Fresno County, 472 Palm Avenue, Fresno, California. Gentlemen: 'I was granted a personal appearance before your board on February 12. However, I did not receive the notice of the appearance until February 16, so could not be there. I will be glad to come if you will grant me another hearing.

'Please change my address to 305 E. Bunny Avenue, Santa Maria so that I will receive my mail on time.

'Leeman Williams'

Then following are some envelopes to bear it out. And then on page 36 we have a copy, carbon copy apparently, of a letter sent to Leeman Williams, General Delivery, Santa Maria, California:

'Dear Sir: Referring to your undated letter regarding your request for personal appearance, this is to advise you that you were granted an appearance before this Board within the 10 days allowed and you failed to appear. This 10 day period may not be extended. (SSS Reg. 1624-1(a). Your file has been forwarded to the Appeal Board for action.'

They are wrong on the law. They probably did not allow it out of ignorance; they thought they could not give him another date. They are wrong. If he had placed his initial request after the ten-day period, then they would have been right, but since his initial request was within the ten-day period and in writing, the mere fact that one date was not satisfactory for any reason, whatsoever, to them or to him, they could give him another date. They do that all the time. Sometimes the

board member is ill, and sometimes the registrant says 'I'll be in New York' and for that reason they give him another date.

MR. KWAN: It is not true the request was made within ten days.

MR. TIETZ: The fact they gave the hearing, page—

THE COURT: What is not true?

MR. KWAN: It is not true he made a request within the ten-day period.

THE COURT: Let's look at the facts.

MR. TIETZ: Page 31.

THE COURT: Page 31. Leeman Roy Williams,—that is February 8th. 'Your request for a personal appearance before the members of the local board has been granted. An appointment has been made for you to appear on February 12th', and this was received on February 25th . . . [Defendant recalled to witness stand and 6 pages of testimony with argument intervened]

THE COURT: Well, I think the Court must accept this young man's testimony in regard to the matter, and I think he should have been given the personal appearance, the extension of the personal appearance.

What were you going to say?

MR. KWAN:Your honor, I might submit to the Court the fact that once he has been classified by the local board and after he has been classified by the Appeal Board, the classification by the Appeal Board supersedes the entire proceedings, and if there were any error in the local board's classification it has been cured by the action of the appeal board.

MR. TIETZ: A novel interpretation.

THE COURT: The Court will find the defendant not guilty. The bond is ordered exonerated.

MR. TIETZ: Thank you."

Time and again the courts have pointed out (by acquitting or reversing convictions) that hearings are of the utmost importance to registrants and that a denial, under circumstances calling for one, is a denial of due process.

See *Davis vs. United States,* 150 F. 2d 308;
United States vs. Romano, 103 F. Supp. 547;
United States vs. Peterson, 53 F. Supp. 760;
United States vs. Laier, 52 F. Supp. 392.

Especially see *United States vs. Hufford,* 103 F. Supp. 859, where "The local board refused to grant the registrant a further opportunity . . ." The Court declared:

> "Though the local board may have been technically correct in refusing to grant another hearing, such a view appears narrow and not within the spirit of liberality reflected by the regulations." [861]

(2) The second part to this argument is that the file itself (pages 36-46) show that the Appeal Board and the Attorney General wanted him to have this second chance. The reason doubtless is that they wanted a full and fair record.

1. Page 36 shows the initial request of the Appeal Board that the so-called "special appellate pro-

visions for conscientious objectors" be given defendant.

2. Page 39 shows the initial effort made by the Appeal Board to insure that defendant was notified, namely, a check on his address. The local board gave it to the appeal board.

3. Page 40 is crucial. It indicates that the Attorney General, on February 10, 1954, tried to get a new address for the defendant because he had not appeared at the February 4, 1954 date. [Note from the Crotty correspondence, Exhibit A, that Mr. Crotty had promptly notified the Attorney General that defendant had not appeared on the 4th.]

4. Pages 42, 43, 44, and 45 are also crucial. They show that on February 12th the local board told the Attorney General that the only address they had was the Percy Street one, and then, when they received his February 15th notice of change of address to La Habra on the 16th the local board *did not* pass this along to the Attorney General. Then the appeal board itself started an inquiry, to give defendant another chance, and, although *it* was sent the new address on the 17th, the Attorney General was *not* notified by anyone, and on March 15th he sent his opinion (page 47 - .....) to the appeal board.

It is submitted that the failure of the Selective Service System to follow through on this second chance problem was unfair to defendant.

E. The trial court erred in quashing the subpoena; at least an *in camera* inspection should have been made by the trial judge for one or both of the following reasons: (1) to compare the FBI report and the Hearing Officer's report and thus determine if the report was a fair one; (2) to determine if the advantage to the appellant of making it available for use in his defense, outweighed the public interest in preserving FBI secrecy.

The factual basis for this point and the argument on it is found in the printed transcript of Record, pages 18-22.

POINT IV.

DEFENDANT'S LIABILITY FOR SERVICE WAS ILLEGALLY EXTENDED BEYOND AGE 26 ON FEBRUARY 17, 1949 AND HE WAS ILLEGALLY DEPRIVED OF A CLASS IV-D "EXEMPT" CLASSIFICATION ON SAID DATE.

Page 11 of the Exhibit shows that a IV-F classification was given the defendant on February 17, 1949.

This classification gave color of law to the extension of his liability beyond age 26. If the classification was improper it needs no argument that appellant has been prejudiced by it.

The facts are evident from the Selective Service file:

1. Defendant registered on September 8, 1948. [p. 2]

2. He filed his Classification Questionaire on November 1, 1948. [p. 4]
3. He did not then (or ever) claim a IV-F classification. [p. 10, Registrant's Statement Regarding Classification]
4. He did not then (or ever) furnish any information that his current physical condition was impaired. [p. 10, Series XV]
5. In fact, he made flat statements, to the contrary, as follows:

1. "Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the armed forces? Yes ..... No X.

2. If the answer to Question 1 is 'Yes,' state the condition from which you are suffering, none."

6. On the other hand, he had given the board ample evidence that he was a full-time student of the ministry, and under *Dickinson vs. United States,* 74 S. Ct. 152, was entitled to the IV-D Classification.

a. His registration card, September 8, 1948 [p. 1] showed he was a student at Pacific Bible College.
b. His Classification Questionnaire, November 1, 1948 [p. 6] showed again that he was such a student, and later [p. 9] he had been such a student for two years. Nevertheless, the board did not classify him where he clearly belonged, in Class IV-D. He was entitled to it and if he had it it could well be that he would have remained so qualified until after his 26th birthdate. This is emphasized by the fact he thereafter wasn't reclassified for 34 months! As was said in *United States vs.*

Graham, 108 F. Supp. 794, "A full and fair disposition of the defendant's contention at every level of the Selective Service system is the measure of their rights." [797]

7. On January 4, 1949, a mimeographed form came to the local board indicating defendant had been rejected *during World War II* as physically unfit. [p. 13] On the same day the clerk wrote defendant [p. 14] checking up on his current *student status.* His compliance with the request [p. 15] was prompt. Nevertheless, he was not classified in Class IV-D but evidently, solely on the basis of the uncorroborated mimeographed form, *of his condition many years before* [p. 13] was classified in Class IV-F and without any physical examination or even a questioning of the registrant to determine a factual basis for the classification. A later physical examination showed the utter lack of basis in fact for such a determination. [See p. 11, entry of 8/22/52].

Two conclusions therefore appear to be justified:

1. There was no basis in fact for the IV-F Classification; it was made without any attempt to determine the current [controlling] facts.
2. The failure to give him the IV-D (ministerial student) classification flew in the face of the *prima facie* case he made and is contrary to the Supreme Court's *Dickinson decision.*

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant

No. 14635

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NICK JOHN KALINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 14635

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NICK JOHN KALINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on November 3, 1954, under Section 462 of Title 50 App., United States Code, for refusing to submit to induction into the Armed Forces of the United States [Tr. 3 and 4].

On November 15, 1954, appellant appeared before the Honorable James M. Carter, United States District Judge. He was arraigned and entered a plea of not guilty. The case was set for trial for November 23, 1954 [Tr. 4 and 5].

On November 23, 1954, trial was begun in the United States District Court for the Southern District of California, before the Honorable James M. Carter, without

a jury and at the close of evidence and argument the case was taken under submission by Judge Carter [Tr. 15-42].

On December 13, 1954, appellant was found guilty as charged in the indictment [Tr. 50].

On December 20, 1954, appellant was sentenced to imprisonment for four years [Tr. 55].

The District Court had jurisdiction of the cause of action under Section 462 of Title 50 App., United States Code, and Section 3231 of Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.
STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50 App., United States Code.

The Indictment charges a violation of Section 462 of Title 50 App., United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty af carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.
STATEMENT OF THE CASE.

The Indictment returned on November 3, 1954, charges that the appellant was duly registered with Local Board No. 110. He was thereafter classified I-A-O and notified to report for induction into the Armed Forces of the United States on May 26, 1954, in Los Angeles, California. The Indictment charges that the defendant at that time and place did knowingly fail and refuse to be inducted into the Armed Forces of the United States [Tr. 3 and 4].

On November 15, 1954, appellant appeared for arraignment and plea before the Honorable James M. Carter, United States District Judge. Appellant was there represented by his attorney, J. B. Tietz, Esq. Appellant entered a plea of not guilty and his case was set for trial on November 23, 1954 [Tr. 4 and 5]. On November 23, 1954, trial was held before the Honorable James M. Carter, without a jury and the case taken under submission by him [Tr. 15-42].

On December 13, 1954, appellant was found guilty as charged in the Indictment [Tr. 50].

On December 20, 1954, appellant was sentenced to the custody of the Attorney General for imprisonment for a period of four years [Tr. 55].

Appellant assigns as error the judgment of conviction on the following grounds:

1. The District Court erred in failing to grant the motions for judgment of acquittal.

2. The District Court erred in convicting the appellant and entering a judgment of guilty against him (Appellant's Br. p. 6).

IV.
STATEMENT OF THE FACTS.

On September 8, 1948, Nick John Kaline registered under the Selective Service System with Local Board No. 110, Los Angeles, California [Ex. 2, p. 1].* He gave his date of birth as August 31, 1926, and was at that time 22 years old. On his registration card in Question No. 10 he was asked "Were you ever rejected for service in the Armed Forces?" He checked the answer "Yes" and wrote in "1945."

In November, 1948, appellant completed his Classification Questionnaire. At that time he did not sign Series XIV [Ex. 2, p. 10] or in any way indicate that he was a conscientious objector. Meanwhile the Local Board was advised that appellant had been rejected for service at the induction station in 1945 because of "valvular heart disease" [Ex. 2, p. 13]. On February 17, 1949, appellant was classified IV-F by the Local Board by a vote of 2 to 0.

On August 15, 1951, the Local Board was advised by Pacific Bible College that appellant was no longer enrolled as a student in that school [Ex. 2, p. 16]. Actually appellant has ceased to attend Pacific Bible College in January, 1951 [Ex. 2, p. 52], but he at no time advised the Local Board of this change in his status. At the time appellant ceased attending the seminary—and lost any claim he might have had to a IV-D classification—he was 24 years old.

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*Exhibit 2 refers to appellant's Selective Service File and the page numbers refer to the circled numbers in the file. Exhibit 1 consists of the correspondence of Homer D. Crotty, the Hearing Officer of the Department of Justice, concerning appellant's case.

On December 18, 1951, appellant was classified I-A by the Local Board by a vote of 3 to 0 [Ex. 2, p. 11].

On December 27, 1951, appellant was mailed an "Order to Report for Armed Forces Physical Examination" [Ex. 2, p. 17]. Two days later on December 29th the Local Board received a letter from appellant asserting that he had always been a conscientious objector and requesting an appropriate form [Ex. 2, p. 18]. The form was then mailed to appellant and returned by him on January 18, 1952 [Ex. 2, pp. 19-22]. On March 1, 1952, the Local Board classified appellant I-O by a vote of 2 to 0.

On October 20, 1952, after having again been found physically acceptable for service, appellant was mailed an "Application of Volunteer for Civilian Work" with an accompanying letter from the Local Board, in accordance with the civilian work program for conscientious objectors [Ex. 2, pp. 24 and 26]. No reply was received from appellant. On November 20, 1952, appellant was classified I-A by a vote of 3 to 0.

On November 28, 1952, appellant wrote a letter to the Local Board [Ex. 2, p. 25] expressing his dissatisfaction with his classification. Thereafter the Local Board permitted the defendant to appear before them in person on December 19, 1952. The summary of this meeting may be found at pages 27 to 30 of appellant's Selective Service file [Ex. 2]. At that appearance appellant explained his views and also revealed to the Local Board that he was employed at Com-Air Products, a machine shop doing defense work [Ex. 2, p. 30]. Following the personal appearance appellant was classified I-A-O on December 19, 1952, as a person opposed to combatant service and train-

ing but not opposed to non-combatant service [Ex. 2, p. 11].

It is interesting to note at this point that while appellant did not advise the board that he had ceased to attend school, and did not advise the board until the time of the interview that he was employed in a defense plant, and as will be seen later, he did not advise the board of his change of address—nevertheless he notified the board on December 23, 1952 [Ex. 2, p. 31] that there had been a "change in age" wherein appellant became 26 years old.

On December 31, 1952, appellant wrote the board another letter [Ex. 2, pp. 33-34]. In that letter appellant stated:

> "I even changed my place of employment, after great consideration of doing the right thing. I am not a pacifist and felt this is where the line must be drawn; I could do an important job and still not be bound to an 'oath of man,' but rather to the 'oath of God.'" [Later investigation reveals Ex. 2, pp. 52-53, that appellant left Com-Air Products in February, 1953, and became employed by the A. O. Smith Corporation, another plant doing war work.]

The Local Board treated this letter from appellant as a letter of appeal and forwarded his file to the Appeal Board on February 19, 1952 [Ex. 2, p. 36].

On September 18, 1953, the Appeal Board asked for and received on September 23rd appellant's latest address [Ex. 2, p. 39]. This information was transmitted by the Appeal Board to the Department of Justice where the case had been referred for investigation and hearing [Ex. 2, p. 40]. On January 21, 1954, appellant was notified that his hearing before a Hearing Officer of the Department of Justice had been set for February 4, 1954 [Ex. 1]. Ap-

pellant failed to appear at the hearing and on February 5, 1954, the Hearing Officer returned his file to the Department of Justice [Ex. 1]. At this point the Department of Justice still held itself ready to give appellant a hearing and on February 10, 1954, wrote the Local Board for appellant's latest address [Ex. 2, p. 41]. On February 12th, the Local Board replied to the inquiry from the Department of Justice, advising that appellant's latest address was the one earlier given them [Ex. 2, p. 42]. On February 16th, appellant advised the Local Board of his change of address [Ex. 2, p. 43], and on March 1, 1954, he wrote the Hearing Officer requesting a new hearing date [Ex. 1]. On March 2nd the Hearing Officer replied to appellant's letter and on the same day wrote the Department of Justice concerning appellant's request. By letter dated March 12, 1954, the Department of Justice advised the Hearing Officer that appellant's case had already been processed by the Department [Ex. 1]. On March 15, 1954, the Department of Justice wrote the Appeal Board [Ex. 2, pp. 47-50] recommending that appellant be classified in I-A-O because "his employment by a concern which is working on contracts for the various branches of the Armed Forces is apparently inconsistent with a professed conscientious objection to service in the armed forces in a non-combatant capacity." Thereafter on April 15, 1954, appellant was classified I-A-O by the Appeal Board by a vote of 3 to 0 [Ex. 2, p. 11].

On May 12, 1954, appellant was mailed an Order to Report for Induction ordering him to report on May 26, 1954 [Ex. 2, p. 54].

On May 26, 1954, appellant reported to the induction station but refused to be inducted into the Armed Forces [Ex. 2, pp. 55-57].

V.

ARGUMENT.

POINT ONE.

The Fact That the Local Board Did Not Have a Person With the Title of "Advisor" Did Not Deny Defendant Due Process of Law.

Appellant relies on Section 1604.41 of the Selective Service Regulations (32 C. F. R. 1604.41). That section provides for the appointment of "Advisors to Registrants" and describes their duties as "to advise and assist registrants in the preparation of questionnaires and other Selective Service forms and to advise registrants on other matters relating to their liabilities under the Selective Service law." The testimony concerning advisors reveals [Tr. p. 31] that there was no one with the "technical name" of advisors but that there are other people in the Selective Service System who perform the same functions. The record also reveals [p. 37] that appellant testified that he never at any time made a request of the Local Board for assistance or advice, rather he consulted his minister. It should be noted that all the evidence concerning advisors came from officials of Selective Service and the appellant was not asked whether he had ever examined the bulletin board of his Local Board. Appellant's Selective Service file [p. 11] reveals that he was in the Local Board office on only one occasion. The record of appellant's personal appearance before the Local Board on December 19, 1952, reveals that during most of this period appellant was a college student.

It would seem clear on this record that appellant was not denied due process of law by the failure to have someone with the title of "advisor." This is at most a mere irregularity and not a matter of due process.

Appellant in his brief at page 11 cites the case of *Simmons v. United States,* 348 U. S. 397, decided March 14, 1955, in support of his contention. That case involved the failure of a Hearing Officer to advise a registrant of adverse evidence. The Supreme Court remarked [pp. 405-406]:

> "We are endeavoring to apply a procedure . . . in accordance with the statutory plan and the concepts of basic fairness which underlie all our legislation . . . This is not an incidental infringement of technical rights. Petitioner has been deprived of the fair hearing required by the Act, a fundamenal safeguard, . . ."

Appellee submits that the faiure to have someone by the title of advisor does not infringe our "concepts of basic fairness" but rather is at most "an incidental infringement of technical rights."

Appellant further urges the Court at page 10 of his Brief to consider the fact that on January 31, 1955, the Regulations were amended to make the appointment of advisors permissive. Appellant refers to this as an "implied admission." This is very much like offering evidence of safety precautions taken after an accident in order to prove negligence—a practice frowned on by all Courts. The Amendment of this Regulation admits nothing. It is designed merely to eliminate the argument and re-argument in case after case of a matter that does not affect the rights of a Selective Service registrant. Surely it would not be argued that a registrant was denied due process of law if there was no provision in the regulations for an "advisor." How then can the failure to have someone with that title constitute a denial of

due process? Either the Director of Selective Service has created a new constitutional right, or it is only an irregularity. If an irregularity, then there must be some evidence of prejudice to the registrant. There is no such evidence in the instant case.

POINT TWO.

The Evidence Shows That Appellant Was Given an Opportunity to Go Through the Induction Ceremony and Refused to Do So.

In *Chernekoff v. United States,* 219 F. 2d 721, this Court ruled that a registrant must be given a definite opportunity to be inducted or refuse to be inducted into the Armed Services. In that case, at page 725, the Court states the following as facts:

> "In the present case the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless to apply the Special Regulation to the Appellant as he had said he would not if asked to so do step forward and become inducted into the Armed Forces."

This is not the evidence in the instant case. Appellant's Selective Service file reveals that on May 26, 1954, induction officials notified the United States Attorney of appellant's refusal to be inducted into the Armed Services [Ex. 1, p. 55]. At page 56 of the Exhibit there is a statement signed by appellant and dated May 26, 1954, stating his refusal to be inducted. This statement was witnessed by a Captain Beydler, the same officer who sent the notice to the United States Attorney. Nowhere is there any evidence that "appellant was not given the

prescribed opportunity to step forward, nor the prescribed warning" which were the facts in the *Chernekoff* case. Quite to the contrary, it is presumed that the regulations were followed.

> "A presumption of regularity attaches to official proceedings and acts; it is a well settled rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and *where the contrary is asserted it must be affirmatively shown.*" (*Koch v. United States,* 150 F. 2d 762, 763, which is a Selective Service case from the Fourth Circuit.) (Emphasis added.)

Thus the presumption exists in this case that appellant was ordered to take the one step forward. It is a presumption that can only be overcome by affirmative evidence to the contrary. The record in this case reveals that appellant took the witness stand on his own behalf at the trial below. He was there represented by his attorney, J. B. Tietz, Esq. Nowhere in appellant's testimony [Tr. pp. 32-37] is there any indication he was not ordered to take the one step forward.

The evidence in appellant's Selective Service file supports the conclusion that he was in fact asked to take the one step forward. The induction procedures are found in Special Regulation 16-180-1. As a part of that same regulation, induction officials are required in paragraph 27(b)(1) to ask each such registrant to make a signed statement of his refusal to be inducted. This statement is found at page 56 of the Exhibit. Paragraph 27(b)(2) provides for the sending of a notice of such refusal to

the United States Attorney and this notice can be found at page 55 of the Exhibit. These steps clearly are the last ones taken by induction officials when a registrant refuses induction and the only inference that can fairly be drawn from the evidence, even excluding for the moment the presumption of regularity, is that appellant refused to take the step forward, thereafter signed a statement to that effect and that the induction officials notified the United States Attorney—all done under the same Special Regulation concerning induction.

Thus the burden was upon the appellant to rebut the Government's showing the District Court.

The reason why appellant was not questoined concerning the events at the Induction Station, and the inherent danger in the Court considering this point now, can be seen when the case of *Bradley v. United States* (9th Cir.), 218 F. 2d 657 (Cert. granted and reversed on other grounds on March 28, 1955), is examined. In that case the evidence offered by the Government *was exactly the same as the evidence offered here.* As a matter of defense Bradley attempted to show that he was not given an opportunity to refuse induction. This Court ruled that his showing was inadequate from his own testimony, even though as a matter of fact he was never asked to take a formal "one step forward." In the instant case, had appellant raised this point at the trial of the case the Government could *at least* have produced evidence to fall within the *Bradley* case.

POINT THREE.

A. Appellant Was Not Entitled to Receive a Copy of the Report of the Hearing Officer to the Department of Justice.

In his argument (Appellant's Br. p. 12) appellant intimates that the case of *Gonzales v. United States,* 348 U. S. 407, decided March 14, 1955, ruled that a registrant in the Selective Service System must be given a copy of the report of the Hearing Officer to the Department of Justice. This is not the holding of that case. The Court said (at p. 417):

> "We hold that the over-all procedures set up in the statute and regulations, designed to be fair and just in their operation . . . require that the registrant receive a copy of the Justice Department's recommendation and be given a reasonable opportunity to file a reply thereto."

Nothing is said in the Opinion about any requirement that a copy of the Hearing Officer's report to the department be given a registrant, and appellant's position with respect to the *Gonzales* case is unsound.

B. There Is No Evidence in the Record That Appellant Did Not Receive a Copy of the Department's Recommendation.

Appellant's statement in this regard consists of the following (Appellant's Br. p. 12):

> "No copy of the Department's recommendation was placed in the file until after the Appeal Board's decision."

The *Gonzales* case did not rule that the Department's recommendation must be placed in appellant's file at any

particular time. The *Gonzales* case ruled that a registrant must be given a copy of the Department's recommendation, in an appropriate case, prior to the time the Appeal Board acts. No evidence was offered on this point other than appellant's Selective Service file. It was never mentioned throughout the trial or in any motion presented to the District Court, or in appellant's points on appeal. The fact that the Department's recommendation was not added to the file until after the Appeal Board's decision is no evidence on whether appellant received a copy of the Department's recommendation, for in any event it would not become a part of his file until after the Appeal Board's decision.

It is not here contended by appellee that the appellant did in fact receive a copy of the Department's recommendation. Rather it is the position of appellee that this Court cannot pass upon that issue without taking the evidence on it now.

In the light of the recent Supreme Court cases in the Selective Service Field, we do not view this as a failure of proof by the Government, and therefore plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. The Supreme Court reversed the *Gonzales* case where evidence had been produced by the defendant at the trial that he had not received a copy of the Department's recommendation, but on the same day in an Opinion written by the same judge, the Supreme Court affirmed the case of *Witmer v. United States,* 348 U. S. 375, where no such record was made at the trial. The Supreme Court has adopted the same approach in cases submitted to them since the decision in the *Gonzales* case. Thus, in *Bradley v. United States, supra,* the Supreme Court on March 28, 1955 granted certiorari and reversed, as the record

had been made in the trial court that the registrant had not received a copy of the Department's recommendation. On the same date, the Supreme Court denied certiorari in the case of *White v. United States,* 215 F. 2d 782 (9th Cir.), and *Tomlison v. United States,* 216 F. 2d 12 (9th Cir.), where the record had not been made at the trial. It is submitted that this Court should approach the problem in the same manner as the Supreme Court and decide these cases based on a record made at the trial.

In any event this case is clearly distinguishable from the *Gonzales* case. In the instant case appellant *failed to appear at the hearing before the Hearing Officer* [Ex. 49]. There is nothing in the Act or regulations which requires a registrant to appear at the hearing conducted by the Department of Justice. On the other hand, a registrant is in a poor position to claim that he has been denied due process of law by the Department of Justice when he fails to take advantage of the opportunity offered him by the Department. The Supreme Court said in the *Gonzales* case that the registrant was "entitled to know the thrust of the Department's recommendation" (p. 414). Appellant might well have learned of the Department's "thrust" had he appeared at the hearing. In a sense, he failed to exhaust his administrative remedies before the Department.

C. The Recommendation of the Department of Justice Was According to Law and Based on Facts Contained in Appellant's Selective Service File.

In his personal appearance before the Local Board on December 19, 1952, appellant stated [Ex. 2, p. 30] that he worked at Com-Air Products which he described as a machine shop doing defense work. He stated that the company manufactured cylinders for aircraft. He indi-

cated that the nature of the work was secret. Appellant was sent a résumé of the investigative report which can be found beginning at page 51 of his Selective Service file. It reveals (p. 52) that at the time of the investigation in 1954, appellant was then employed by the A. O. Smith Corporation working on material on subcontracts for the Air Force and the Navy. The résumé further reveals (p. 53) that appellant had quit a job in January of 1952 giving as his reason that he was entering the United States Army. In *White v. United States,* 215 F. 2d 782 (9th Cir.), this Court said at page 786:

> "In view of his experiencing no difficulty working upon the manufacture of munitions for war, the board was not without justification in concluding that White had no conscientious objections to participation in war through the manufacture of arms and munitions, just so long as he did so for a private company and not for the government. It was therefore but natural for the boards to believe that if a registrant's conscience was not bothered while working on war contracts he could not justly claim he was conscientiously opposed to noncombatant participation in war activities . . . The registrant's facility in forwarding the cause of war, force and killing through activity in a war plant, may well demonstrate his failure to establish his status as a person conscientiously opposed to noncombatant duty."

It should be noted that in the *White* case the registrant had been classified I-A-O, the same classification received by appellant here. Thus it can be seen that the Department of Justice as well as the Local Board and the Appeal Board applied the yardstick fixed by this Court in the *White* case.

In *Witmer v. United States, supra,* the Supreme Court endorsed a searching inquiry into the sincerity and good faith of a claimant for a conscientious objector classification. The Court said (pp. 381-382):

> "In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. . . . any fact which casts doubt on the veracity of the registrant is relevant."

In the *Witmer* case the Court upheld the registrant's I-A classification noting among other things that while he claimed to be a conscientious objector he promised to increase his farm production and contribute a satisfactory amount for the war effort. Surely, working in a plant making the tools of war contributes more directly to the war effort than does the growing of food on a farm.

D. Loss of a Privilege by Reason of Appellant's Negligence Is Not a Denial of Due Process.

Government's Exhibit 1 reveals that appellant was sent a notice on January 21, 1954, notifying him that the date set for his hearing was February 4, 1954. Appellant failed to appear at the hearing, and the Hearing Officer returned his file to the Department of Justice. Thereafter, the Department of Justice held itself ready to grant a new date for a hearing for several days after it received the file [Ex. 2, p. 41]. When the Department learned [p. 42] that appellant's last address was the one to which the notice had been sent they processed his file from the written record. On February 16th, appellant advised the Local Board of his new address and advised the Hearing Officer on March 1, 1954, nearly a month after the original date set for hearing. The Hearing Officer immediately contacted the Department [Ex. 1]

and the Department advised him in reply that it had already processed his file. According to appellant he did not appear at the hearing because he had moved and failed to advise the draft board of his change of address [Tr. 35; Ex. 2, Appellant's letter of March 1, 1954].

Section 1641.3 of the Selective Service Regulations (32 C. F. R. 1641.3) provides:

> "It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

In his letter to the Hearing Officer [Ex. 1] appellant characterizes this as his "negligence." At the trial appellant said that it was his "fault" [Tr. 35], and that he took the "blame" [Tr. 37]. The facts surely bear out that it was appellant's fault. At the trial he offered the excuse that when he moved he didn't expect to remain at his new address very long and didn't wish to change his driver's license, notify the draft board and every other place of a change of address [Tr. 35]. In his letter to the Hearing Officer appellant gave a different version—that his draft board was the *only* one that he forgot to notify of his change of address. Appellant was given a hearing by the Department of Justice and the fact that he did not appear at that hearing was caused by his own negligence.

Appellant asserts that it was an abuse of discretion not to grant him a new hearing. As just noted, the notice

of hearing was sent appellant two weeks prior to the date set for the hearing. The Department of Justice tried to reach him and held itself ready to grant a new date for several days after appellant failed to appear, but finally processed his file from the record [Ex. 1, Department's letter dated March 12, 1954]. Is this an abuse of discretion? Surely the facts speak for themselves.

Appellant cites several cases purportedly in support of his contention that he was entitled to a second hearing. The cases referred to involve a personal appearance by a registrant before the Local Board, and it is obvious from the reading of them that in each instance the Court felt that the registrant was without fault. In the instant case appellant did not have a hearing before a Hearing Officer because of his own negligence. Should this Court adopt appellant's contention here, it would lift the burden placed on a registrant to keep the Selective Service System advised of his whereabouts and place the burden upon Selective Service and the Department of Justice to seek out and find a registrant. This is clearly impractical and contrary to the intention of the regulations. Further, it would open the door to fraud.

E. The District Court Did Not Err in Quashing the Subpoenas Duces Tecum.

At the trial below appellant subpoenaed the report of the Hearing Officer to the Department of Justice and the F.B.I. reports relating to his case. Judge Carter quashed the subpoenas [Tr. 26-27]. There can be no question here as to the propriety of quashing the subpoena for the report of the Hearing Officer. When appellant failed to appear for the hearing the Hearing Officer returned his file without making a report [Ex. 1].

Appellant argues in his brief (p. 22) that the District Court erred in quashing the subpoena for the F.B.I. report stating that the Court should have compared the F.B.I. report and the Hearing Officer's report to determine if the Hearing Officer's report was a fair one. This argument is obviously untenable since no Hearing Officer's report was in existence.

This Court stated in *White v. United States, supra,* in footnote 11, page 790:

> "It is a matter of common knowledge that if the F.B.I. is to obtain from neighbors or acquaintances of the registrant a report on which it can rely, it is essential 'that frankness on the part of persons interviewed be encouraged by assurance that their identity will not be divulged,' *Elder v. United States, supra,* 202 F. 2d 465 at 469. A favorable report by a neighbor who expects to have his identity disclosed to registrant would not be worth much."

The Court then went on to observe (pp. 790-791):

> "We see nothing in the requirements of the statute or in the demands of due process or in what was decided in the *Nugent* case which would require that any portion of an F.B.I. investigation undertaken for these purposes should be made available to the registrant either before the Hearing Officer or at the time of his prosecution for failure to submit to induction.
> . . .
> ". . . but surely the Supreme Court knew perfectly well that if there were anything to appellant's present contention such would normally be Nugent and Packer's next step, once they were put on trial. We refuse to believe that the Court labored and brought forth a mouse of a decision that the Hearing

> Officer need not show the F.B.I. report when the situation was such that the trial Court must necessarily admit it."

Appellant was given a résumé of the F.B.I. Investigative Reports [Ex. 2, pp. 51-53]. There is nothing in the Department's letter of recommendation to the Appeal Board [Ex. 2, pp. 47-50] that is not included in that résumé and in the appellant's Selective Service file. Since these were the only matters before the Appeal Board, and the only matters that could possibly affect appellant's classification, the F.B.I. reports themselves are immaterial.

As heretofore noted, appellant did not appear at the hearing before the Hearing Officer. There is no conceivable theory under which appellant can now claim that he was prejudiced by the refusal of the Court to admit the F.B.I. reports when appellant failed to appear at the Department of Justice hearing where he could discuss the matter with the Hearing Officer and explain or deny any of the matters contained therein.

POINT FOUR.

Appellant's Liability for Service Was Not Illegally Extended Beyond Age 26.

In *Talcott v. Reed, etc.,* 217 F. 2d 360 (9th Cir., 1954), this Court ruled that when the validity of a I-A classification was necessarily dependent upon the validity of a prior IV-F classification, the Court could properly inquire into whether there was a basis in fact for that IV-F classification. It is settled, however, that a registrant is not

entitled to a judicial review of any classification from which he did not appeal. *Rowland v. United States,* 207 F. 2d 621 (9th Cir.). In the instant case appellant did not appeal from his IV-F classification [Ex. 2, p. 11] but was satisfied to remain there for nearly three years. Thus, he is not now entitled to urge upon the Court the invalidity of his IV-F classification.

At the trial below appellant argued that he was entitled to challenge the IV-F classification because, he contended, he could not appeal from that classification. The regulations do not support this position. Selective Service Regulation 1626.2(a) (32 C. F. R. 1626.2(a)) provides:

> "* * * the registrant * * * may appeal to an appeal board from any classification of a registrant by the local board except that no such person may appeal from the determination of the registrant's physical or mental condition."

It is true, then, that a registrant may not appeal as to the *finding* of his physical condition, but it is also true that a registrant may appeal from a IV-F classification urging upon the appeal board that even if his physical or mental condition is as the Local Board has found it to be, he is still entitled to some other classification. This, appellant did not do.

The danger of permitting a judicial review of a classification when there has been no appeal from the classification can be demonstrated by the facts in this case. Appellant was born on August 31, 1926. He did not become 26 years of age until August 31, 1952—more than a year

and a half after he left Pacific Bible College [Ex. 2, pp. 16 and 52]. Appellant did not contact his local board and inform them that he was no longer in school. He did not advise the Board that he was working in a defense plant. He did not claim to be a conscientious objector. Rather, appellant was content to abide with his IV-F classification and thus avoid induction. In his brief at page 23 appellant speculates that he was entitled to a IV-D classification and adds:

> "* * * It could well be that he would have remained so qualified until after his 26th birth date."

The fact remains, however, that any qualification appellant might have had for a IV-D classification terminated in January, 1951, when he left Pacific Bible College [Ex. 2, p. 52]—more than a year and a half before he reached age 26.

In any event, appellant's Selective Service file reveals that there was a basis in fact for the IV-F Classification. Appellant registered under the Universal Military Training and Service Act in September, 1948. On his registration card [Ex. 2, p. 1], he was asked in question number 12, "Were you ever rejected for service in the armed forces?" Appellant checked the answer "Yes" and wrote the date "1945." Further, the Local Board was advised [Ex. 2, p. 13] that appellant was rejected for service on April 4, 1945, because of "valvular heart disease." This constitutes a basis in fact for the IV-F classification. The Court might compare the record here with that in *Talcott v. Reed, etc., supra,* where the Court considered the same

contention as here is urged. At page 364 the Court stated:

> "To the printed question in the questionnaire as to whether, in his opinion, he had any mental or physical disqualifications, he answered, 'No.' He later added, 'I was discharged from Naval Reserve Training Corps because of a punctured ear drum. And again later he explained, 'As stated in Series XV, I feel that the condition of my ear drum should be clearly established.' It would, perhaps, have been advisable for the Board to have complied with this suggestion, but that they did not do so does not vitiate the evidence tending to establish the punctured ear drum. The evidence constituted a basis in fact. See *Dickinson v. United States,* 346 U. S. 389, and *Cox v. United States,* 332 U. S. 442, 443."

There is stronger evidence in the instant case to support the IV-F classification than in the *Talcott* case, and the District Court's finding that there was a basis in fact [Tr. pp. 49-50] should not be disturbed.

As heretofore noted, the Supreme Court on March 28, 1955, denied certiorari in the case of *White v. United States, supra.* The instant case is on all fours with the *White* case, *i. e.,* both White and Kaline were classified I-A-O principally because of their employment in war work. At the time the Supreme Court denied certiorari all the law had been written with respect to the *Gonzales* case. It is submitted that if the Supreme Court saw no compelling reasons to upset the conviction of White, this Court should find no compelling reason to upset the conviction of the appeillant here.

Conclusion.

1. The District Court did not err in denying appellant's motion for judgment of acquittal.

2. The Judgment of the District Court is supported by substantial evidence and its judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Asst. United States Attorney
Chief, Criminal Division,

CECIL HICKS, JR.,
Asst. United States Attorney,

Attorneys for Appellee, United States of America.

No. 14636

United States Court of Appeals

for the Ninth Circuit

MITCHELL PAUL DOBRENEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-25-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

MANUEL REAL,
Assistant U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 23921 CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MITCHELL PAUL DOBRENEN,

Defendant.

INDICTMENT

[U. S. C., Title 50, App., Sec. 462 Universal Military Training and Service Act.]

The grand jury charges:

Defendant Mitchell Paul Dobrenen, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 107, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed

forces of the United States of America on August 25, 1954, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder [2*] in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill,

/s/ W. H. REPLOGLE,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

Bond fixed in the amount of $.....

HWK:AH

[Endorsed]: Filed November 10, 1954. [3]

[Title of District Court and Cause.]

MINUTES OF THE COURT—NOV. 29, 1954

Present: Hon. James M. Carter,
District Judge.
U. S. Att'y., by Ass't. U. S. Att'y., Bruce A. Beven.
Counsel for Defendant J. B. Tietz.
Defendant present (on bond).

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Proceedings:

For arraignment and plea.

Defendant is arraigned true name and pleads Not Guilty.

It is Ordered that this cause is set for jury trial at 10:00 a.m., December 14, 1954.

EDMUND L. SMITH,
Clerk.
By L. B. FIGG,
Deputy Clerk. [4]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Mitchell Paul Dobrenen, Defendant, in the above-entitled matter, through their respective counsel, as follows:

That it be deemed that the Clerk of Local Board No. 107 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Mitchell Paul Dobrenen, is a registrant of Local Board No. 107.

3. As Clerk of Local Board No. 107, is legal custodian of the original Selective Service file of Mitchell Paul Dobrenen.

4. The Selective Service file of Mitchell Paul Dobrenen is a record kept in the normal course of business by Local Board No. 107, and it is the normal course of Local Board No. 107's business to keep such records. [5]

It is Further Stipulated that a photostatic copy of the original Selective Service file of Mitchell Paul Dobrenen, marked "Government's Exhibit 1" for identification, is a true and accurate copy of the contents of the original Selective Service file on Mitchell Paul Dobrenen.

It is Further Stipulated that a photostatic copy of the Selective Service file of Mitchell Paul Dobrenen, marked "Government's Exhibit 1" for identification, may be introduced in evidence in lieu of the original Selective Service file of Mitchell Paul Dobrenen.

Dated this 14th day of December, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant United States Attorney, Chief of Criminal Div.

/s/ CECIL HICKS, JR.,
Assistant United States Attorney, Attorneys for Plaintiff.

/s/ J. B. TIETZ,
Attorney for Defendant.

/s/ MITCHELL PAUL DOBRENEN,
Defendant.

It is So Ordered this 14th day of Dec., 1954.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed December 14, 1954. [6]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. In view of the draft board's failure to prepare findings of fact to controvert or impeach the defendant's conscientious objector claim, the defendant should be acquitted and the Court should hold that the final I-A classification was contrary to law arbitrary, capricious and without basis in fact.

2. The reclassification from Class I-O to Class I-A was made without basis in fact and solely because of invalid and artificial reasons.

3. The adverse recommendation of the Attorney General to the Appeal Board, used and relied on by said Appeal Board was unsupported by any factual basis therein, or in the file.

4. The local board deprived the defendant of procedural due process of law by failing to have posted conspicuously at the [7] office of the local board the names and addresses of the advisors to registrants, as required by Section 1604.41 of the regulations, to his prejudice.

5. The undisputed evidence is that the defendant gave the Hearing Officer of the Department of Justice material information, not contained in the filed and that neither it, nor a summary thereof, appears in the only document transmitted by the De-

partment of Justice to the Appeal Board, to wit, the letter of adverse recommendation by the Attorney General, now designated pages 50-51 of the selective service file.

6. The failure of the Court to compel the production of the FBI secret investigative report, so as to ascertain whether the defendant was given by the hearing officer a full and fair resume of the adverse evidence which tended to defeat the conscientious objector claim, and the Court's order sustaining the Government's motion to quash the subpoena duces tecum constituted a deprivation of the defendant's procedural rights.

7. The final adverse recommendation of the Department of Justice to the appeal board was not given to the defendant and he was not given a copy of it before he was placed in the final I-A classification; thereby he was deprived of his rights to answer and defend himself before the appeal board, contrary to the act and the Fifth Amendment to the United States Constitution.

8. The Department of Justice deprived defendant of his rights to procedural due process of law when it failed and refused to include in the file the report of the Hearing Officer, and the regulation prohibiting the placing of the report in the file is invalid because it conflicts with the act and the due-process clause of the Fifth Amendment to the United States Constitution.

9. It was the duty of the Department of Justice, regardless of its recommendation, to provide the appeal board with a complete summary of the

favorable evidence appearing in the FBI report that was also developed at the hearing before the hearing officer and reported by him. The Department's failure to provide the appeal [8] board with a complete summary of such evidence deprived the defendant of a full and fair hearing before the appeal board.

10. The failure of the Court to compel the production of the FBI investigative report and the order of the court sustaining the motion to quash the subpoena duces tecum made by the Government constitute a deprivation of the defendant's rights to due process of law upon criminal trials, contrary to the Fifth Amendment to the United States Constitution and the right to confrontation guaranteed by the Sixth Amendment, and also violate the statutes and rules of court providing for the issuance of subpoenaes in behalf of defendants in criminal cases.

/s/ J. B. TIETZ,
Attorney for Defendant.

Clerk:

File nunc pro tunc as of date of trial.

/s/ JAMES M. CARTER,
Dist. Judge.

12/21/54.

Nunc pro tunc filed December 14, 1954.

[Endorsed]: Filed December 21, 1954. [9]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 14, 1954

Present: Hon. James M. Carter,
District Judge.
U. S. Att'y, by Ass't U. S. Att'y: Cecil Hicks, Jr.
Counsel for Defendant: J. B. Tietz.
Defendant present (on bond).

Proceedings:

For jury trial. Counsel answer ready.

Defendant waives a jury and signs written waiver, which is approved by the Court and filed.

Attorney Tietz makes opening statement for defendant.

Gov't moves orally to quash a subpoena duces tecum, dated Dec. 6, 1954, served on the F.B.I., the U. S. Att'y, and Lt. Col. Keeley to produce certain records and documents. It Is Ordered that said motion stand submitted.

A stipulation of facts is presented in writing, approved by the Court and filed.

Gov't Ex. 1 is admitted in evidence.

Gov't rests.

It Is Ordered that motion to quash the aforesaid subpoena duces tecum is granted.

Elias M. Keeley, witness for defendant, is called, sworn, and testifies.

Mitchell Paul Dobrenen, defendant herein, is called, sworn, and testifies in his own behalf.

Deft's Ex. A and B are marked for ident.

Jack Green, witness for defendant, is called, sworn, and testifies.

Defendant rests. There is no rebuttal.

Attorney Tietz argues for defendant.

Court recesses to 2 p.m. At 2 p.m. court reconvenes herein, and all being present as before, including defendant and counsel for both sides.

Attorney Tietz argues further for defendant.

Attorney Hicks argues for Gov't.

Defendant moves for judgment of acquittal, and It Is Ordered that said motion is denied.

Court Finds defendant guilty as charged, waives report of Probation Officer, and Orders cause continued to 2 p.m., Dec. 20, 1954, for sentence, and that defendant may remain on bond pending sentence.

EDMUND L. SMITH,
Clerk.

By L. B. FIGG,
Deputy Clerk. [10]

[Title of District Court and Cause.]

RENEWAL OF MOTION FOR JUDGMENT OF ACQUITTAL AND, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

The defendant moves the Court for a judgment of acquittal upon the same grounds heretofore urged and, in the alternative, to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's mo-

tion for acquittal made at the conclusion of all the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

Dated at Los Angeles: December 15, 1954.

/s/ J. B. TIETZ,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 16, 1954. [11]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 20, 1954

Present: Hon. James M. Carter,
District Judge.
U. S. Atty., by Asst. U. S. Atty.: Cecil Hicks, Jr.
Counsel for Defendant: J. B. Tietz.
Defendant present (on bond).

Proceedings:

For (1) hearing on renewed motion of defendant, filed Dec. 16, 1954, for judgment of acquittal or for new trial; (2) sentencing (upon a finding of guilty).

Attorney Tietz argues motions.

It Is Ordered that motions for judgment of acquittal and new trial are denied.

Court Sentences defendant to four years' imprisonment for offense charged in Indictment.

Defendant files notice of appeal and application for admission to bail pending determination of appeal. It Is Ordered that motion for bail is denied.

Defendant moves for stay of execution.

It Is Ordered that stay of execution is granted until 12 o'clock noon Dec. 27, 1954, and that upon defendant's surrender his bond will be exonerated.

EDMUND L. SMITH,
Clerk.

By L. B. FIGG,
Deputy Clerk. [13]

United States District Court for the Southern District of California, Central Division

No. 23,921—Criminal

UNITED STATES OF AMERICA

vs.

MITCHELL PAUL DOBRENEN

JUDGMENT AND COMMITMENT

On this 20th day of December, 1954, came the attorney for the Government, and the defendant appeared in person and by counsel, J. B. Tietz.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of

guilty of the offense of failing and neglecting to perform a duty required of him under the Universal Military Training and Service Act and the regulations thereunder, in that he failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do, in violation of 50 U.S. Code, App., Sec. 462, as charged in the Indictment; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years.

It Is Adjudged that defendant is granted a stay of execution until twelve o'clock noon, December 27, 1954, and that upon his surrender to custody his bond will be exonerated.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JAMES M. CARTER,
United States District Judge.

[Endorsed]: Filed December 20, 1954. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Mitchell Paul Dobrenen, resides at 156½ So. Pecan Street, Los Angeles 33, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462—Selective Service Act, 1948, as amended.

On December 20, 1954, after a verdict of Guilty, the Court sentenced the appellant to confinement in an institution to be selected by the Attorney General for .....

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

[Endorsed]: Filed December 20, 1954. [15]

In the United States District Court, Southern District of California, Central Division

No. 23,021—Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MITCHELL PAUL DOBRENEN,
Defendant.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,
United States Attorney, by

CECIL HICKS, JR.,
Assistant United States Attorney.

For the Defendant:

J. B. TIETZ, ESQ.

December 14, 1954—10 A.M.

(Other court matters.)

The Court: All right, call the other case.

The Clerk: No. 23921 Criminal, United States v. Mitchell Paul Dobrenen, for jury trial.

Mr. Tietz: We will waive the jury. The Govern-

ment understood that.

The Court: You will waive what?

Mr. Tietz: The jury.

The Court: Has that waiver been signed yet?

The Clerk: No, your Honor.

The Court: Mr. Dobrenen, the Constitution of the United States provides that you are entitled to a trial by jury, and you can only lose that right by a waiver in writing signed in open court; have you talked to your attorney, Mr. Tietz, about waiving trial by jury?

The Defendant: Yes.

The Court: And after talking with him it is your decision to waive your jury trial?

The Defendant: Yes.

The Court: All right.

The document has been signed by the defendant and counsel. I will approve it.

The Government has filed a trial brief in the matter [2*] which I have looked over, and the defendant has filed a trial memo, merely listing the cases on which he will rely. Mr. Tietz, do you want to give me an outline form of the points that you want to make, the subject-matter of them, so I can follow along?

Mr. Tietz: Yes, your Honor. You will have a total of nine points. The first one will be that there is no basis in fact for denying one of the conscientious objector classifications.

This defendant received eventually a I-A.

The second point is that he was illegally—that is,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

the Draft Board exceeded its jurisdiction when it reclassified him from I-O to I-A on November 14, 1952.

The third point will be that the recommendation of the Attorney General to the Appeal Board gave either no or insufficient facts to support their opinions, and therefore the conclusion they reached would fall.

The fourth point is that the Local Board had no advisor and didn't post the name of any advisor, and he was prejudiced thereby.

The fifth point is that the Hearing Officer did not give him a fair hearing in that he didn't send on to the Attorney General material, pertinent information that the registrant gave him.

The sixth point is based on the supposition that the [3] court may do as it has done in the past, quash the subpoena for the FBI reports, refuse to admit them. We believe that—and we will argue it later—would be erroneous, for we have several attacks to make on the bona fides and fairness of the Hearing Officers' report to the Attorney General and the Attorneys General's recommendation to the Appeal Board.

The next point is that neither the Hearing Officer, nor the Attorney General sent the defendant any copies of the reports they made, that is, the Hearing Officer to the Attorney General, and the Attorney General to the Appeal Board, so that he had the opportunity to set the record straight on misconceptions of fact, and that was to his prejudice.

The next point——

The Court: Let me inquire. It has never been the practice in any case to do that, has it?

Mr. Tietz: No.

The Court: This is a new point you are making?

Mr. Tietz: It is not a new point; it is a point that has not been decided yet by any court. It has been——

The Court: Have you raised it before?

Mr. Tietz: Yes. I will point out—as a matter of fact, it is before the Supreme Court now.

The Court: You have raised it before trial judges in [4] this district?

Mr. Tietz: Yes, sir.

The Court: And they turned you down on it?

Mr. Tietz: Yes, sir.

The Court: Do you have it on appeal to the Circuit?

Mr. Tietz: It is farther than that. The general counsel for Jehovah's Witnesses has it on appeal in the Supreme Court. Certiorari has been granted in the Gonzales case.

The Court: Well, certiorari may have been granted in that case, but was that one of the grounds on which certiorari was granted? There is a big difference. The Supreme Court will grant certiorari in a case and will also specify the particular points that they are going to consider. Now, do you know whether or not——

Mr. Tietz: I haven't that information. I do have the information before me that there were only three points in that case, and I can give the court

those points and the court could then judge whether or not it was considered by the Supreme Court.

The Court: What were the three points?

Mr. Tietz: The first point was one shared by all six of the cases that are either in there or certiorari had been applied for. Four are in and two certiorari has been applied for and I do not know, I don't think there has been any decision [5] yet——

The Court: What is that point?

Mr. Tietz: The no basis in fact on the conscientious objector classification as distinguished from the Dickinson IV-D classification.

The Court: The White situation?

Mr. Tietz: White, Tomlinson, Gonzales, all have that one point in common.

The Court: What is the second point?

Mr. Tietz: The second point in the Gonzales case is the fact that his recent conversion to the belief of Jehovah's Witnesses was used by the Selective Service system and by the Department of Justice as one of the bases for denying him the conscientious objector classification.

So that those two, with the point that the Attorney General didn't mail him copies of the recommendation, are the three that are briefed.

I have taken these points from the briefs of the petitioner, which I had.

The Court: Do you know what the number of the Gonzales case is on the Supreme Court docket?

Mr. Tietz: Yes. No. 69 on the October term.

The. Court: This term?

Mr. Tietz: Yes.

The Court: All right. [6]

Mr. Tietz: They were admitted October 14th, I believe.

The Court: I would guess that certiorari was granted on the first ground.

Mr. Tietz: It may be, but that ground is present in every one of the six.

The Court: That is probably why certiorari was granted in those cases.

That is No. 7. Now, what is your eighth point and ninth point?

Mr. Tietz: No. 8 is another one that no court has directly passed on, although I do have one Circuit decision that I think helps my argument, and that is that there is no Hearing Officer report in the file.

The court may recall that years ago when the court had a criminal calendar last, they appeared, and the regulations were changed, and my argument is going to be that the regulation is contrary to the Act and therefore void.

Now, my ninth point——

The Court: You say no court has passed on this. Do you mean in a written decision? You have urged this——

Mr. Tietz: No, no.

The Court: You haven't even urged this one?

Mr. Tietz: No, I haven't urged it. The reason why is this: Yesterday I received one of the many helps that the general counsel for Jehovah's Witnesses sends out to [7] attorneys that are associated with him in cases, and among the 47 points that he

has briefed for the help of local counsel were two that I have never presented. And the next one——

The Court: I wonder how you missed those.

Mr. Tietz: Lawyers differ, any many a time——

The Court: That is a facetious remark. There is no ill feeling in connection with it, Mr. Tietz.

Mr. Tietz: On the contrary, I always have my ears open, although sometimes I don't hear quick enough.

Yesterday when my client Clark presented a matter, I am going to make that the basis for a motion for a new trial. He had something there. Clients often have things that lawyers don't see.

The Court: Young Clark should be an expert on this matter now. How many years has he been working on this file?

Mr. Tietz: Like many a young man, he has been processed and reprocessed.

The Court: He is making it a career.

Mr. Tietz: I think the Selective Service is making it a career for him.

My last point to be stated is as follows: It was the duty of the Department of Justice, regardless of its recommendation, to provide the Appeal Board with a complete summary of the favorable evidence appearing in the FBI report that [8] was also developed at the hearing before the Hearing Officer and reported by him. The Department's failure to provide the Appeal Board with a complete summary of such evidence deprived the defendant of a full and fair hearing before the Appeal Board.

Now, might what I have said be considered as a

motion made at the end of all the evidence so I won't have to take the time of the court to repeat this?

These are my points that I am certain will arise in the case based on the evidence.

The Court: You have listed them, so if you want to incorporate them by reference you may refer back to what we will refer to as your list of points. Is that satisfactory?

Mr. Tietz: Thank you.

Mr. Kwan: Your Honor, may I have permission to bring up the matter of Joy Stevens-California and Ben Stevens, case No. 23871? The defendant is in court now.

The Court: Yes.

(Interruption for other court matters.)

The Court: All right, Mr. Hicks, proceed.

Mr. Hicks: Your Honor, may I at this time make a motion to quash the subpoenas? Yesterday afternoon I was advised that subpoenas had been served upon the special agent in charge, or his deputy, of the Federal Bureau of Investigation, the United States Attorney or his assistant, and Lt. Col. [9] Elias M. Keeley. It is a subpoena duces tecum directed to those three persons directing them to bring to this court room this morning in this case the secret recommendation of the Hearing Officer to the Department of Justice and the complete secret investigative report made by the FBI agents and/or others in the investigation of the conscientious objector claim made by the defendant and submitted

to the Hearing Officer of the Department of Justice, considered by him and relied upon by him in making his report to the Department, and relied upon by the Attorney General in his recommendation to the Appeal Board of the Selective Service System.

The Court: Let me see the subpoena.

(Handing document to the court.)

The Court: All right. Now, you want to make a motion. State your motion. May it be done orally, Mr. Tietz?

Mr. Tietz: I beg your pardon?

The Court: May the motion be made orally?

Mr. Tietz: Yes.

Mr. Hicks: It is a motion to quash the subpoena, your Honor, and the motion is based upon the decision in the White case, which passed upon the question of subpoenaing the FBI reports.

It is made on the further ground, on behalf of Lt. Col. Keeley, that none of the items mentioned therein are in his possession. [10]

Mr. Tietz: I didn't hear the last part.

(Record read by the reporter.)

The Court: What is the present status? This FBI problem went to the Supreme Court in the Nugent case.

Mr. Hicks: That is correct, your Honor. And the Nugent case said that the registrant was entitled to a fair resume of adverse evidence.

The Court: And it is your contention that the Selective Service file contains such a fair summary?

Mr. Hicks: Yes, your Honor, it does.

The Court: Then you say the matter was considered in the White case?

Mr. Hicks: Yes, it was, your Honor. And the court in the White case held that the subpoenas were properly quashed.

Mr. Tietz: To save a little time, your Honor, I agree with the United States Attorney on that. I am raising the point merely to protect the record in the event the Supreme Court reverses the Ninth Circuit.

It is in the Tomlinson and the White cases, as well as in the Simmons case, so it is definitely before the Supreme Court in the Simmons case and may be in the Tomlinson and White cases.

The Court: For the purpose of the record I probably should have the Selective Service file in evidence before [11] the motion is ruled on. So I will take the motion under submission at this time and subsequently rule on it.

Mr. Hicks: Your Honor, I have here a photostatic copy of the Selective Service file of Mitchell Paul Dobrenen and I ask that it be marked Plaintiff's Exhibit 1 for identification.

The Clerk: Government's 1 for identification.

(The document referred to was marked Plaintiff's Exhibit 1, for identification.)

Mr. Hicks: I have, also, your Honor, a stipulation entered into by myself representing the Government, by Mr. Tietz representing the defendant, and signed also by the defendant himself, concern-

ing the testimony of the clerk of Local Board 107. It is the customary stipulation.

The Court: All right. Hand it to the clerk. It may be filed.

On the basis of the stipulation Exhibit 1, for identification, will be received in evidence.

(The document referred to, marked Plaintiff's Exhibit 1, for identification, was received in evidence.)

Mr. Hicks: The Government rests, your Honor.

Did your Honor wish to rule upon the motion? You haven't had an apportunity to examine the file. Excuse me.

The resume referred to, your Honor, is on page 52.

The Court: All right. The motion to quash is granted. [12]

Mr. Hicks: May Mr. Norton of the FBI, who is here in response to the subpoena, be excused, your Honor?

The Court: He may be excused.

All right, Mr. Tietz.

Mr. Hicks. The Government rests.

Mr. Tietz: The defendant will call Col. Keeley.

ELIAS M. KEELEY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Elias M. Keeley.

Direct Examination

By Mr. Tietz:

Q. Colonel, what position do you hold with Selective Service?

A. I am a lieutenant colonel in the United States Army, assigned to Selective Service, and in the capacity of district co-ordinator for Selective Service.

Q. Local Board 107 is within your jurisdiction?

A. It is.

Q. You have a degree of familiarity with the office arrangement of that board?

A. I do. [13]

Q. That board has a bulletin board in its office, does it not, where the public can see things?

A. It does.

Q. Has that Board ever had posted on that bulletin board the names and addresses of the advisors to registrants as provided by Section 1604.41 of the regulations?

A. I don't know whether I can say that——

Q. I will withdraw that.

Instead of saying "ever" at any time during the processing of this registrant, which covers a period October, 1950, to the present.

A. It has had the names of our Government appeal agents, and the Local Board members, clerks, and registrars, which we deem advisors. All are advisors to registrants.

Mr. Tietz: I ask that the last be stricken as unresponsive.

(Testimony of Elias M. Keeley.)

The Court: Overruled. You asked him a question relating to the statute. Now, what is an advisor is a question of fact. He said these people are in his opinion advisors.

Overruled.

Q. (By Mr. Tietz): Has there ever been a functionary of that Local Board termed an advisor, as stated in Section 1604.41?

A. Not in the language of that particular section.

Q. Do you mean by your answer that all the various [14] officials you have named are willing to advise, if someone asks them for advice?

A. That is their purpose, yes.

Q. Has there ever been——

The Court: Have they been instructed to give advice to registrants if registrants come to them?

The Witness: Yes, your Honor.

The Government appeal agents are attorneys who are appointed for that specific purpose. There are about fifty Government appeal agents here in Southern California, in Los Angeles County.

Q. (By Mr. Tietz): That is one for each board?

A. That's right.

Q. There is a special section in the regulations that provides for the functionary known as Government appeal agent, isn't there?

A. That's right.

Q. And that is entirely separate and distinct from the functionary known as advisor to registrants? A. That is correct.

(Testimony of Elias M. Keeley.)

Q. Has there ever been a posting on the bulletin board that the various people you named would give free advice to registrants upon request?

A. Yes, most bulletin boards carry information to the registrants for them to inquire at the desk, and the [15] information will be given them.

Q. Can you quote approximately the wording of that notice? You know, Colonel, this is the first time I have heard that, although I have asked in half a dozen local cases and many throughout the State, that there was such a notice. Will you tell us what that notice says?

A. Each Local Board puts their own notice on the board to that effect. The SSS form 110 Notice of Classification carried printed right on there that if the registrant wishes any advice he may request the same from the Government Appeal agent.

Q. Advice on appeal? A. On anything.

Q. Is it that broad?

A. Yes, the Government appeal agent is supposed to advise registrants on any and all questions.

Q. Have you ever seen the notice on the bulletin board of Local Board 107?

A. There is a notice there that I noticed the day before yesterday, I would say last week, which does give reference to some of the registrars, and what the wording is I cannot say.

Mr. Tietz: That is all.

The Court: What is this form number you have referred to? [16]

(Testimony of Elias M. Keeley.)

The Witness: SSS form 110. That is a Notice of Classification. That is the postcard that is mailed to the registrant following every classification.

Mr. Tietz: You won't find that in the file.

The Court: You don't have copies of it?

The Witness: No. Generally the United States Attorney sets it up in his brief.

The Court: Do you have one available, Mr. Tietz?

Mr. Tietz: I happen to have with me every version that has been used since 1942. Would the court like me to pass them up?

The Court: Well, I would just like the one that was sent to this registrant if you have it.

Do you have it, or some samples?

Mr. Tietz: I had better go over them with the Colonel. They aren't all dated. I want to make sure I don't hand you the wrong one.

The Court: Here is one that was dated April 13th, '53, not to this registrant; can I read this into the record?

Mr. Tietz: Yes. We can assume that that was the version used during the processing, the major portion, any way, of this registrant.

The Court: On the form SSS-110, which is on a postal card, one side of the postal card of course is reserved for the name and address of the registrant and the Government [17] mailing stamp. Up in the left-hand corner the address of the Local Board. Then on the other side of the postal card

(Testimony of Elias M. Keeley.)

there is a box about the size of a card that you put in a purse, reading on three sides, "Cut out this line to detach card." Inside of that card appears the name of the registrant, his number, his classification, the date, and the vote of the Board. It is signed by a member of the Local Board.

Then the following appears:

"The law requires you, subject to heavy penalty for violation, to carry this notice, in addition to your registration certificate, on your person at all times—to exhibit it upon request to authorized officials, to surrender it upon entering the Armed Forces to your commanding officer."

All that appears in italics.

"For advice see your Government Appeal Agent."

Then follows another paragraph about what the law requires of the registrant.

On the left-hand side of the card, to the left of this detachable cutout card, appears some small type with the heading, "Notice of Right to Appeal."

Do I need to read that in, I wonder? [18]

Mr. Tietz: That is what the appeal agent functions on.

The Court: That is your contention. If you want it read——

Mr. Tietz: Only that. According to the regulation, which I will ask the court to read or have me read it to the court, I have them here——

The Court: I will read the rest of this card, then.

"Notice of Right to Appeal. Appeal from classi-

(Testimony of Elias M. Keeley.)

fication by Local Board must be made within 10 days after the mailing of this written notice by filing a written notice of appeal with the Local Board. Within the same 10-day period you may file a written request for personal appearance before the Local Board. If this is done the time within which you may appeal is extended to 10 days from the date of mailing of a new notice of classification after such personal appearance. If an appeal has been taken and you are classified by the Appeal Board in either class I-A or class I-A-O, and one or more persons of the Appeal Board dissented from such a classification, you may file a written notice of appeal to the President with your Local Board within 10 days after the mailing of this notice." [19]

All right. I hand the card back to you, Mr. Tietz, and you may keep it.

Mr. Hicks: May I proceed, your Honor?

The Court: Yes. Were you through with Col. Keeley?

Mr. Tietz: Oh, yes. He was on cross-examination.

Cross-Examination

By Mr. Hicks:

Q. Col. Keeley, is there anyone provided by the Local Boards to advise and assist registrants in the preparation of questionnaires and other Selective Service forms?

A. Yes, we have about three or four clerks in each board, and also the Government appeal agent and the registrar who registers, originally registers

(Testimony of Elias M. Keeley.)

the registrants; and, also, Local Board members, if the man requests that information.

Q. How many registrars are there in Los Angeles County?

A. As of today I think there is 144.

Q. How many Local Boards are there?

A. 47.

Q. You say there is a Government appeal agent, there is one Government appeal agent for each Local Board? A. Yes.

Q. And how many Local Board members are on each Local [20] Board?

A. Three or more, up to five. There are approximately 151 Board members in Los Angeles County.

Q. Is there anyone at the Local Board to advise registrants on other matters relating to their liabilities under the Selective Service law?

A. There is about 15 clerks in each location headed by a local group co-ordinator, and in the event the local group co-ordinator cannot answer the questions they are referred to my office or Capt. Miller's office, or Col. Hartwell's office.

Q. Would Government appeal agents also advise registrants concerning their liabilities under the law? A. Yes. They do it every day.

Mr. Hicks: That is all.

The Court: May the Colonel step down?

Mr. Tietz: Yes.

The Court: Thank you, Colonel. [21]

MITCHELL PAUL DOBRENEN

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please?

The Witness: Mitchell Paul Dobrenen.

Mr. Tietz: Before asking this witness a question, may I recall Col. Keeley for a question or two and have this witness just step aside?

The Court: Yes, step down.

ELIAS M. KEELEY

called as a witness by the defendant, having been previously sworn, resumed the stand and testified further as follows:

Redirect Examination

By Mr. Tietz:

Q. Colonel, you testified a few minutes ago that there is a posting on the bulletin board of Local Board No. 107 of the fact that there are various functionaries, registrars, appeal agents, and others, who will give advice? A. That's right.

Q. Was there such a posting at any time from October 26, 1950, to approximately June, 1954?

A. I think you are taking in a little bit too much territory. There was no such a posting, maybe, prior to [22] January 1st, 1954, because at that time we did not have the particular type of advisor to registrants. Those are only appointed if the State Director deems it advisable.

Q. It is definite that at no time have you had

(Testimony of Elias M. Keeley.)

advisors as called for by 1604.41?

The Court: That calls for a conclusion of the witness.

What you mean is at no time have you had an employee or a functionary of the system to whom you gave the title of Advisor, is that right?

The Witness: Advisor to Registrants.

The Court: Advisor to Registrants.

The Witness: That is correct.

Q. (By Mr. Tietz): You believe we are safe in understanding that at no time prior to January, 1954, was there any posting on the bulletin board that advice, free advice, could be obtained by registrants?

A. No. There has always been some information on the bulletin board about advice. But there has not been the names of the registrars and other particular names on the bulletin board only since about January 1st, 1954, when you first raised that point.

Mr. Tietz: That is all.

Mr. Hicks: No questions.

The Court: All right. Step down, Colonel. [23]

MITCHELL PAUL DOBRENEN

called as a witness in his own behalf, having been previously sworn, resumed the stand and testified as follows:

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case, are you not? A. Yes.

(Testimony of Mitchell Paul Dobrenen.)

Q. You had a hearing before a Hearing Officer of the Department of Justice, did you not?

A. Yes.

Q. Do you have a recollection of what took place during that hearing? A. Yes.

Q. Can you tell us whether or not after that hearing at any time you were ever sent a copy of the Hearing Officer's report to the Attorney General? A. No.

Q. Can you tell us whether at any time you were ever sent a copy of the Attorney General's recommendation to the Appeal Board? A. No.

Q. When did you first see the Attorney General's recommendation to the Appeal Board?

A. I went to the Local Board and looked at my file. [24]

Q. About when was that?

A. About the second week of August.

Q. Why did you go then?

A. I got my induction papers and I went down to look at the file.

Q. And then you saw the letter that the Attorney General wrote to the Appeal Board, which is pages 50 and 51 of the exhibit here today?

A. Yes.

Q. What did you do?

A. I went to one of the advisors from the church, Mr. Pete Wren.

Q. W-r-e-n, is it not?

(Testimony of Mitchell Paul Dobrenen.)

A. Yes. And I copied the file, and he looked at it and asked me if the things were true in there. And there were some points that were not true, so we wrote a rebuttal statement on it.

Q. Did that rebuttal statement include things you had told the Hearing Officer that he did not send on to the Attorney General? A. Yes.

Q. Name some of them.

A. Well, he states in his report that my limitations to the Molokan Church attending is due—I told him is due to the fact that I don't understand Russian. And that is [25] true. But also I stated that I belong to the Young Russian Christian Association and attend Bible class on Wednesday and Sunday evenings, and service on Sunday and, help——

Q. How often do you attend them?

A. Regularly.

Q. You mean every week?

A. I miss a few times, yes.

Q. You told that to the Hearing Officer?

A. Yes.

Q. And you found nothing of that in his report? A. Nothing.

Q. But you did find something about not attending the Molokan Church regularly?

A. Yes.

Q. What else did you find in the——

The Court: I don't know how we can have a witness that says he can't find things in a file. The file speaks for itself. And as a matter of fact, this

(Testimony of Mitchell Paul Dobrenen.)

file shows just the contrary to what the witness has testified. If you look at page 52. "A leader of the Young Russian Christian Association"——

Mr. Tietz: Your Honor is reading from the resume of the FBI; not what the Hearing Officer said or what this defendant said.

The Court: Let me finish what I am reading then. [26]

"A leader of the Young Russian Christian Association advised that the registrant regularly attends meetings of that association as well as the Molokan Church."

Did you tell the Hearing Officer you were a member of the Russian Christian Molokan Church?

The Witness: R u s s i a n Christian Molokan Church?

The Court: Yes. Did you tell him you were a member?

The Witness: Yes.

The Court: Is the Young Russian Christian Association a part of the Russian Christian Molokan Church?

The Witness: A part of it? No, I wouldn't say it is part of.

The Court: It is under the same church?

The Witness: No, it isn't.

The Court: Under what church is it?

The Witness: Well——

The Court: Or does it come under the jurisdiction of the church?

(Testimony of Mitchell Paul Dobrenen.)

The Witness: Not under the Russian church, but a majority of the members, in fact, just about all the members belong to the Molokan Church.

The Court: Is this association connected with any other church?

The Witness: No, I don't think so. [27]

The Court: Then you only belong to one church?

The Witness: The Molokan Church.

The Court: That is what you told the Hearing Officer?

The Witness: Yes.

The Court: Go ahead, Mr. Tietz.

Q. (By Mr. Tietz): What are these Wednesday night meetings? Are they religious in character?

A. Yes, they are Bible classes.

Q. Is there anything else that you told the Hearing Officer that he did not transmit in his report to the Attorney General, and that you do not find in the Attorney General's letter to the Appeal Board?

A. Yes.

Q. What was that?

A. I mentioned to him the fact that on the investigative report there is one point that was not correct. It states that I left a job without notice. But I did talk it over with the superintendent before I left the job. And they said I never did—I didn't go back to work over there. But after the first of the following year I worked there for about a month at the same place that I left.

(Testimony of Mitchell Paul Dobrenen.)

Q. After you saw these things, and then you secured advice from an elder of the Molokan Church named Pete Wren—he is an elder, isn't he?

A. Yes. [28]

Q. (Continuing): You made up what you call a rebuttal statement. What did you do with that?

A. I mailed it out to I think seven or eight different people.

Q. Were any of them Selective Service people?

A. Yes.

Q. What ones were they, do you recall?

A. I am not sure, but Hartwell and Keeley, and I don't know who the others were.

Q. Did you mail any to the State Director? Did you mail any to Sacramento? A. Yes.

Q. Did you mail any to Washington?

A. Yes.

Q. Have you a copy of it with you?

A. Yes, I have.

The Court: Did you file one with your Local Board?

The Witness: I am pretty sure it was filed with the Local Board. It is not in the exhibit.

The Court: You say "pretty sure." Did you or did you not take one and deliver it to the Clerk of the Local Board?

The Witness: I did not deliver it personally, but I am pretty sure that one was mailed.

Mr. Tietz: I ask that this rebuttal document be

(Testimony of Mitchell Paul Dobrenen.)
marked for identification as Defendant's Exhibit A. [29]

The Court: Mark it A for identification.

(The document referred to was marked Defendant's Exhibit A, for identification.)

The Witness: One is a rebuttal and one is a letter.

The Clerk: There are two documents, your Honor.

The Court. A and B.

(The document referred to was marked Defendants' Exhibit B, for identification.)

Q. (By Mr. Tietz): Are these exact copies of those that you mailed out to these various Selective Service Officers? A. Yes.

Mr. Tietz: I ask that they be introduced, admitted in evidence as Defendant's Exhibits A and B.

Mr. Hicks: I haven't examined them, your Honor.

Mr. Tietz: I am sorry.

The Court: Well, you know that you mailed this to the National Service Board for Religious Objectors, is that right?

The Witness: Yes.

The Court: But you just think that you mailed a copy to the Local Board?

The Witness: Yes, I think—I am not too sure where they were written to, but Mr. Wren gave the names about who to send them to.

(Testimony of Mitchell Paul Dobrenen.)

The Court: Did Mr. Wren give you the name of your Local [30] Board as one of the places to send it?

The Witness: I think it was. It was on Santee Street.

The Court: But you are just pretty sure, you have no certainty that you mailed one to the Local Board?

The Witness: I can check up, but I am not real sure right now.

Q. (By Mr. Tietz): Was Rev. Jack Green with you at any time while this was being done?

A. Do you mean the rebuttal statement?

Q. Yes. A. No.

Q. He was with you at the hearing before the Hearing Officer, was he not? A. Yes.

The Court: What is your offer? Do you offer these in evidence now?

Mr. Tietz: Yes.

Mr. Hicks: Your Honor, I will object to their admission.

May I ask the witness a copule of questions regarding them?

The Court: Yes.

Mr. Hicks: Mr. Dobrenen, the documents that you have handed the clerk, the one containing your own statement—what is that marked, Mr. Clerk?

The Clerk: Defendant's A. I will give it to the witness. [31]

Mr. Hicks: Thank you.

(Testimony of Mitchell Paul Dobrenen.)

That bears the date September 15, 1954. Is that the approximate date on which you sent this material out?

The Witness: Yes.

Mr. Hicks: Your Honor, I will object to them as immaterial. The record reveals that he refused to be inducted on August 26, 1954, and any evidence that was submitted thereafter would have no materiality to the issues in this case.

Mr. Tietz: Your Honor, my thought is that it is corroborative of his testimony and what took place at the Hearing Officer's hearing.

The Court: As to Defendant's Exhibit B, which is the letter from Green, that was also mailed out about the same time as Exhibit A?

The Witness: It was mailed with these letters.

The Court: All right. Objection sustained.

Mr. Tietz: To both the documents?

The Court: Yes.

Mr. Tietz: You may cross-examine.

The Court: They are in the record marked for identification, so you have your record, Mr. Tietz.

Mr. Hicks: No questions, your Honor.

Mr. Tietz: Rev. Green, will you please take the stand. [32]

Rev. Jack Green: I affirm.

The Clerk: You affirm under the pains and penalties of perjury?

Rev. Jack Green: That's right.

REV. JACK GREEN

called as a witness by and on behalf of the defendant, having affirmed to tell the whole truth under the pains and penalties of perjury, testified as follows:

The Clerk: What is your name?

The Witness: Rev. Jack Green.

Direct Examination

By Mr. Tietz:

Q. Rev. Green, will you please tell us your position with the Young Russian Christian Association?

A. Yes. I am the pastor of the church and the director of the organization.

The Court: What church?

The Witness: It is an independent church.

The Court: What is the name of the church?

The Witness: We go by the name of Young Russian Christian Association, for the simple reason that the Molokans oppose their young people attending any other church. We started out around 15 years ago as just a Bible class, and it grew to [33] the place where we have approximately 300 members, and we don't use the name "church" because we try to work—not against the Molokan people, but with the Molokan people, and I am not of Russian descent, and they feel like I am an intruder. We are organized as a church and we are incorporated by the State of California.

Q. (By Mr. Tietz): How long have you known the defendant, approximately?

A. I would say around 12 years.

(Testimony of Rev. Jack Green.)

Q. Has he been a member of the Young Russian Christian Association since approximately that time?

The Court: Just a minute now.

There are certain things that you can do and there are other things that you can't. You can't offer evidence before me that was not offered before the Draft Board. If this evidence is before the Draft Board, this is merely a duplication; if it wasn't offered before the Draft Board, it is too late to offer it before me.

Mr. Tietz: With respect to that, I will have another point to offer in addition to the nine, but I will go on, on the ground that your Honor will not permit a de novo trial——

The Court: That's right.

Mr. Tietz: ——on the conscientious objections of this defendant.

Q. (By Mr. Tietz): Did you appear with this defendant [34] before the Hearing Officer of the Department of Justice? A. Yes, I did.

Q. You heard him testify concerning certain facts that he gave the Hearing Officer?

A. Yes.

Q. Did you hear him make those statements to the Hearing Officer? A. Yes, I did.

Mr. Tietz: That is all. You may cross-examine.

Mr. Hicks: No questions, your Honor.

The Court: You may step down.

Mr. Tietz: Now the defendant rests, your Honor. Has the Government any rebuttal?

Mr. Hicks: No rebuttal, your Honor.

The Court: Well, both sides rest.

You can't finish before noon, can you?

Mr. Tietz: Well, I could. It depends on how much time the Government may need. I could finish in about three-quarters of an hour.

The Court: Well, let's take our regular morning recess and then you can go on until noon, and if we have to come back this afternoon we will take a little time off.

(Recess taken.)

The Court: Let the record show the defendant present with his counsel. [35]

Mr. Tietz: If the court please, in making my argument I want to make certain that there is no possibility of any misunderstanding as to the precise position that this defendant has, as distinguished from others who have had their cases tried in the last day or two, the last few weeks.

(Whereupon there was argument by counsel and discussion between court and counsel, which argument and discussion was reported by the court reporter but not transcribed at the request of counsel.)

The Court: We want a little more time. We will have to take our noon recess. Adjourned to 2:00 o'clock.

(Whereupon at 12:10 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [36]

Tuesday, December 14, 1954, 2:00 P.M.

The Court: All right. Call the case.

The Clerk: No. 23,921 Criminal, United States vs. Dobrenen, further trial.

(Further argument by counsel and discussion between court and counsel, which argument and discussion were reported by the court reporter but not transcribed at the request of counsel.)

The Court: Did you want to repeat a motion based on your points? Is that what you wanted to do?

Mr. Tietz: I thought I did. But to make sure the record is clear, the defendant repeats the nine separate points stated at the——

The Court: At the outset of the case, and characterized then as your list of points?

Mr. Tietz: Yes. And adds to it a tenth point. I can't recall that point. Might I have time to submit a written statement of the nine points and the tenth one? The court heard my statement during the middle of the case on that.

The Court: You can refer to it by reference as being the tenth point, whatever it is. And what is your motion based on those points?

Mr. Tietz: Motion for judgment of acquittal.

The Court: The motion is denied. [37]

The court finds the defendant guilty.

Is there any reason to have a probation report in this case?

Mr. Tietz: No. I would prefer to have the sen-

tence deferred until next Monday afternoon at 2:00 o'clock. The court has some others.

The Court: That is satisfactory. The matter of the probation report will be waived. The defendant will be back here on December 20th at 2:00 p.m. for sentence.

The Clerk: You mean by that he is to remain on bond, your Honor?

The Court: Yes, he may remain on bond.

(Whereupon at 2:45 o'clock p.m. an adjournment was taken until Monday, December 20, 1954, at 2:00 o'clock p.m.) [38]

Monday, December 20, 1954. 2:00 P.M.

(Other court matters.)

The Clerk: No. 30 on the calendar. 23021, Criminal, United States vs. Mitchell Paul Dobrenen.

* * *

Mr. Tietz: Well, may I file an application for bail?

The Court: Let me sentence the defendant now. Are you ready for sentence at this time?

Mr. Tietz: No legal reason why the court shouldn't proceed.

The Court: It is the judgment of this court that the defendant be sentenced, for imprisonment, to the custody of the Attorney General for four years.

Mr. Tietz: I am filing with the clerk a duplicate or triplicate notice of appeal. I have already paid the clerk's fee. I am filing in duplicate application for bail in the sum of $1,000. I think that will be

sufficient, your Honor. There won't be any problem——

The Court: I think it would be more than sufficient, Mr. Tietz, if there was any substantial point of law.

Mr. Tietz: I presented the two points which I think are substantial, and I should add my own view to this: When counsel who has fairly studied the case thinks that there is a chance for his client to secure a reversal on appeal, that [40] should have some weight with the court, and the defendant should get the benefit of the doubt, and he should have a chance to be able to have his appeal. Now, your Honor knows very well that these fellows, if they are to languish in jail, can't use their funds for an appeal. They just haven't the funds. So, in effect, in a good many cases, it is denying an opportunity to the defendant to have a review of his case.

Your Honor would certainly agree with me that in every decision your Honor has made or will make your Honor can't be right in all of them. There are questions of law, like here, that other judges could disagree.

The Court: Did you ever have a Selective Service case that you didn't contend that there was a substantial question of law in it?

Mr. Tietz: Yes, sir. What I used to do——

The Court: Didn't you argue to me a substantial question of law in cases where a registrant had not even taken an appeal?

Mr. Tietz: Yes, sir. Until recently when the

Court of Appeals decided the Mason case. It is not yet reported.

The Court: It is down. I have a copy.

Mr. Tietz: The slip opinion is down, but it is not yet reported. I wasn't convinced on that. I still think that in a case like that there are certain defenses that can be [41] put up on the circumstances of the case. There are certain constitutional attacks that might be made.

For example, if he received a I-O classification—Come to think of it I have two cases before the Court of Appeals, they are both cases where they got the I-O, they wouldn't do the work, they are both Sacramento cases, Reese is one and Riley is another, and they are both out on bail. The judge there, Judge Oliver Carter, was sitting in Sacramento at the time. He thought there was a substantial question. Now, they never took an appeal. So the constitutional attacks there, I think, are substantial points on appeal. And there can even be others. There can be failures in due process as distinguished from attacks on the classification.

I think an individual is foreclosed, a registrant is foreclosed from presenting defenses that are based on classification attacks, no basis and so on. So I would say in most of these cases, regardless, that there are some substantial questions. And, furthermore, I never was so sure of it as I am today. Six months ago I couldn't have been so sure. I was just figuring I would say to these fellows, when they would want an appeal, I would say, "Well, you have got one chance in ten, that is my estimate. You have

asked me for an estimate. One chance in ten." But the way they have been coming down from the Court of Appeals, I [42] have changed my odds.

Of course, the trick is to get in there.

If this fellow is thrown into jail the chances are that his wife won't be able to go ahead. I am not sure about that. But the chances are that that is where he will be.

Fortunately for those other people that I named, Basil Starrett, who was denied bail by Judge Mathes, and by the Court of Appeals, when I went up there, and Roger Clark, who was denied bail by Judge Hammond, and it was denied by the Court of Appeals when I went up there, they had a general counsel who is a very able lawyer, and he went to Washington, he got bail for them after Starrett was in jail in Tucson for ten weeks, and Roger Clark was in the County Jail for about eight weeks, I think.

But these boys don't have that kind of an opportunity.

I just repeat, in closing, there is a substantial basis, as Judge Westover said, to use his words, in all these cases, and certainly now when we see how the various Courts of Appeal have looked at them. So I think that he should be given bail and given his chance.

The Court: Is that all?

Mr. Tietz: Yes, sir.

The Court: Motion for bail on appeal denied. The court finds no substantial question. [43]

Mr. Tietz: May he have a stay of a few days?

The Court: Why? Wasn't this one of the cases that you asked——

Mr. Tietz: It is the Christmas season, let's put it on that basis. Give him a week so he can be home with his wife.

The Court: Well, I don't think this was in the same category as the others. I think this case came up later. In the other two cases you asked for a week and I gave it to you.

Mr. Hicks: It did, your Honor. This was tried last week.

The Court: All right. I will grant a stay of execution until Monday, December 27th, 12:00 noon.

Mr. Tietz: Thank you.

The Defendant: Thank you.

Mr. Hicks: Bond will be exonerated at the time he surrenders?

The Court: Bond will be exonerated at the time of his surrender.

[Endorsed]: Filed December 31, 1954. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 17, inclusive, contain the original Indictment; Stipulation; Motion for Judgment of Acquittal; Renewal of Motion for Judgment of

Acquittal; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal, and a full, true and correct copy of Minutes of the Court for November 15 and December 20, 1954, which, together with the reporter's transcript and the original exhibits, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29th day of December, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14,636. United States Court of Appeals for the Ninth Circuit. Mitchell Paul Dobrenen, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 3, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14636

At a Stated Term, to wit: The October Term, 1954, of the United States Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City of Los Angeles, in the State of California, on Monday, the third day of January, in the year of our Lord one thousand nine hundred and fifty-five.

Present: Hon. Albert Lee Stephens, Circuit Judge, Presiding,

Hon. James Alger Fee, Circuit Judge,

Hon. Richard H. Chambers, Circuit Judge.

MITCHELL PAUL DOBRENEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER SUBMITTING AND GRANTING MOTION FOR BAIL

Ordered motion of Appellant for admission to bail pending appeal presented by Mr. J. B. Tietz, counsel for the Appellant, and by Mr. Cecil Hicks, Jr., Assistant U. S. Attorney, counsel for the Appellee in opposition thereto, and submitted to the Court for consideration and decision.

Upon consideration thereof, It Is Further Ordered that said motion be, and hereby is granted, and the Appellant be, and hereby is admitted to bail pending appeal upon the filing of a bail bond in the sum of One Thousand Dollars ($1,000.00), the bail bond or cash deposited conditioned as required by law, approved by the United States Attorney for the Southern District of California, and the Chief Judge of the said District Court, and filed with the Clerk of said District Court.

[Certified Copy]

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The reclassification of appellant from Class I-O to Class I-A was made without basis in fact and was made solely because of invalid and artificial reasons.

II.

The adverse recommendation of the Attorney General to the Appeal Board, used and relied on by said Appeal Board was unsupported by any factual basis therein, or in the file.

III.

The Local Board deprived the appellant of procedural due process of law by failing to have posted conspicuously at the office of the Local Board the names and addresses of the advisors to registrants, as required by section 1604.41 of the regulations to his prejudice.

IV.

The undisputed evidence is that the appellant gave the Hearing Officer of the Department of Justice, material information not contained in the file, and that neither it, nor a summary thereof, appears in the only document transmitted by the Department of Justice to the Appeal Board, to wit, the letter of adverse recommendation by the Attorney General, now designated pages 50-51 of the Selective Service file.

V.

The failure of the trial court to compel the production of the FBI secret investigative report, so as to ascertain whether the Hearing Officer gave this appellant a full and fair resume of the adverse evidence which tended to defeat the conscientious objector claim, and the Court's order sustaining the Government's motion to quash the subpoena duces tecum constituded a deprivation of the defendant's procedural rights.

VI.

The final adverse recommendation of the Department of Justice to the Appeal Board was not given to the appellant and he was not given a copy of it before he was placed in the final I-A Classification;

thereby he was deprived of his right to answer and defend himself before the Appeal Board, contrary to the Act and the Fifth Amendment to the United States Constitution.

VII.

The Department of Justice deprived appellant of his right to procedural due process of law when it failed and refused to include in the file the report of the Hearing Officer, and the regulation prohibiting the placing of the report in the file is invalid because it conflicts with the Act and the due-process clause of the Fifth Amendment to the United States Constitution.

VIII.

It was the duty of the Department of Justice, regardless of its recommendation, to provide the Appeal Board with a complete summary of the favorable evidence appearing in the FBI report that was also developed at the hearing before the Hearing Office and reported by him. The Department's failure to provide the Appeal Board with a complete summary of such evidence deprived the defendant of a full and fair hearing before the Appeal Board.

IX.

The failure of the Court to compel the production of the FBI investigative report and the order of the Court sustaining the motion to quash the subpoena duces tecum made by the Government constitute a deprivation of the appellant's right to due process

of law upon criminal trials, contrary to the Fifth Amendment to the United States Constitution and the right to confrontation guaranteed by the Sixth Amendment, and also violates the statutes and rules of Court providing for the issuance of subpoenas in behalf of defendants in criminal cases.

X.

In view of the Draft Board's failure to prepare findings of fact to controvert or impeach appellant's conscientious objector claim, he should have been acquitted and this Court should hold that the final I-A Classification was contrary to law, arbitrary, capricious and without basis in fact.

/s/ J. B. TIETZ.

[Endorsed]: Filed January 29, 1955.

No. 14636

In the
United States Court of Appeals
For the Ninth Circuit

MITCHELL PAUL DOBRENEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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In the
United States Court of Appeals
For the Ninth Circuit

MITCHELL PAUL DOBRENEN, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14636

Appellant's Opening Brief

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of four years. [R 13-14]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. The Court has jurisdiction of this appeal under Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 15]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to submit to induction. [R 3]

Appellant pleaded Not Guilty, waived jury trial and was tried on December 14, 1954. [R 10-11] Appellant was convicted by Judge James M. Carter on December 20, 1954 [R 12-13] and sentenced on December 20, 1954. [R 13-14]

At the close of the evidence, a Motion for Judgment of Acquittal was made, argued and denied [R 7]; the motion was renewed and denied at the same time that a Motion for New Trial was made and denied. [R 11-13]

THE FACTS

In his Classification Questionnaire appellant set forth that he had no military experience [Ex 6]; that he had no court record [Ex 9]; that he was a conscientious objector and desired the Special Form for Conscientious Objector.

In his Special Form for Conscientious Objector [Ex 14-17] appellant set forth all the details requested concerning his religious training and belief. He showed he believed in a Supreme Being and that this belief involved duties which are superior to those arising from any human relation [Ex 14]; that he received this training and acquired this belief from his parents, his church (Molokan Spiritual Jumpers, one of the historic pacifist churches) and the Young Russian

Christian Association. [Ex 15] He regularly attended the YRCA Wednesday night Bible classes and the Sunday services. [R 37] He followed the directions on this Special Form and chose to strike out Series I (A), the non-combatant claim, and signed Series I (B), the "complete" conscientious objector claims. He was classified in Class IV-E. At that time Class IV-E was the classification for "complete" conscientious objectors, those whose scruples extended to entering the armed services in any capacity. The classification was later termed I-O on 28 September 1951.

He was reclassified in Class I-O on November 23, 1951 and on October 22, 1952 he was sent a "volunteer" form for certain work. He did not volunteer but chose to await his selective service call. Without any other intervening fact he was reclassified into Class I-A on November 14, 1952 and thereafter notified.

His timely complaint of November 25th [Ex 31] was answered by a request that he present himself before the board for an interview on December 5, 1952. [Ex 34] The "interview" consisted of a stereotyped list of questions to determine if he was a pacifist or if he believed in self-defense. [Ex 35] His answers indicated he did believe in self-defense, and on the same day he was again reclassified in Class I-A. [Ex 11]

In his subsequent administrative appeal he received an adverse recommendation from the Department and was once again reclassified in Class I-A. It appears from the evidence that the recommendation of the Department was at least in part based on such considera-

tions as the irregularity of his church attendance, [Ex 50] and that he was said to have considered taking a job in a defense plant. [Ex 52]

During the trial the following transpired:

1. Defendant's subpoena *duces tecum* (FBI and Hearing Officer report) was quashed. [R 26]
2. The government introduced the selective service file as its sole evidence. [R 25]
3. A selective service official testified that the board did not post the names and addresses of Advisors to Registrants, and in fact, had none. [R 35]

When appellant was ordered to report for induction he did so but announced he would refuse to submit to induction. [Ex 35, 36] There is no evidence in the Exhibit, or in the Record, that appellant was informed of the penalty for refusal and thereafter asked to take the "step forward" at the induction station, this being required by the regulations.

QUESTIONS PRESENTED AND HOW RAISED

I.

Concerning the Hearing Officer hearing:

A. Appellant attacked the procedure of the Department of Justice is not sending copies of the Hearing Officer's report (to the Department) and of the Attorney General's recommendation (to the Appeal Board) to the registrant before the Appeal Board acted. This point (and the following ones) were raised by Motion for Judgment of Acquittal. [R 8, 20, 36] The question presented is whether this procedure conforms to due process requirements. Appellant will argue that the recent Supreme Court decision in *Gonzales vs. United States* is dispositive of the question.

B. Appellant attacked the Regulations and the procedure of the Department of Justice in not placing in the registrant's selective service file a copy of the Hearing Officer's report to the defendant. [R 57, No. VII]

The question presented is somewhat similar to A above.

C. Appellant's evidence also factually attacked the fairness of the Hearing Officer having principally, that submitted material favorable to him, as well as rebuttal evidence, was not forwarded to the Appeal Board. [R 37, 39, 45]

The question presented is whether this situation is covered by the recent Supreme Court decision in *Simmons v. United States.*

D. Appellant attacked the advisory recommendation of the Department of Justice to the Appeal Board as being arbitrary and unsupported by any evidence. [R. 7]

The question presented is whether there was any evidence to support the conclusion and recommendation of the Department.

E. Appellant attacked the bona fides of the Hearing Officer's report and issued a subpoena *duces tecum* for the production of the Hearing Officer's report and the FBI investigative reports so they could be compared. The subpoena was quashed. [R 26]

II.

Concerning failure of the local board to post names and addresses of Advisors to Registrants. [R 7, 35]

It will be submitted that this Court's decision in *Chernekoff v. United States* is dispositive of this question.

III.

Concerning failure of proof of the crime charged; the evidence in this case that there was only a verbal refusal to submit and that there was no warning of the penalty [R 60 and 61] is identical to Chernekoff's and appellant will submit that this Court's decision in *Chernekoff v. United States* is dispositive of this problem.

IV.

Concerning no basis in fact for this I-A classification:

A. Appellant attacked the reclassification from Class I-O to Class I-A as an act based solely on invalid and artificial reasons. [R 27-28, 35-36]
Appellant will submit that several recent decisions of this Court cover this situation. (Frank, Goetz, Hinkle, Blevins and Clark)

B. Appellant attacked the adverse recommendation of the Attorney General, used and relied upon by the Appeal Board, as unsupported by any proper factual basis. [R 50-51]
Appellant will ask this Court to rule as did the Tenth Circuit in *Annett.*

C. Appellant attacked the I-A classification as having no basis in fact, being contrary to appellant's *prima facie* case, and not being rebutted by any evidence or by any finding of inconsistences or lack of veracity.

V.

Appellant raised a point by issuing a subpoena to the FBI and the Hearing Officer for their secret reports concerning him. The subpoena was quashed. [R 26]

This question was decided adversely to appellant's contention by this Court but the matter is now before the Supreme Court.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motions for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT ONE

The facts surrounding the Hearing Officer hearing reveal four denials of due process. The Supreme Court recently disposed of two of the points in accord with appellant's position in *Gonzales* and of another in *Simmons;* this Court may choose to also rule on the fourth point.

POINT TWO

It is a denial of due process for a local board to fail to have Advisors to Registrants.

Chernekoff vs. United States, supra.

If a showing of prejudice is needed this appellant's evidence met the test.

POINT THREE

There is a failure of proof of the crime charged. *Chernekoff,* supra is squarely in point.

POINT FOUR

There was no basis in fact for denying appellant a conscientious objector classification; at the very least he should have received a I-A-O classification. The reasons for denying him at least such a classification have been discredited by this and other courts.

ARGUMENT

POINT I.

THE CIRCUMSTANCES CONNECTED WITH THE PART PLAYED BY THE HEARING OFFICER IN THE ADMINISTRATIVE APPEAL, REVEAL ONE OR MORE DENIALS OF DUE PROCESS.

A. No copy of this officer's report to the Department was ever placed in the file or sent appellant. [R 36] This failure to afford registrants an opportunity to rebut adverse evidence, and the conclusions of the hearing officer is the result of two things: (1) the absence of a selective service regulation requiring that the registrant be given such an opportunity and (2) the policy of the Department of Justice not to give the registrant copies.

This situation was recently considered by the Supreme Court and it declared invalid the procedure of the Department in deciding conscientious objector cases. It held that the above procedure constituted a denial of due process.

It is submitted that *Gonzales vs. United,* ..... U. S. ....., No. 69, decided March 14, 1955, is dispositive of the question.

B. No copy of the Department's recommendation was placed in the file until after the Appeal Board's decision.

The comments on "A", above, apply equally to this point.

C. The undisputed evidence is that the appellant gave the Hearing Officer of the Department of Justice material information, not contained in the file and that neither it, nor a summary thereof, appears in the only document transmitted by the Department of Justice to the appeal board, to-wit, the letter of adverse recommendation by the Attorney General, now designated pages 50-51 of the selective service file. [Ex 50-51]

The factual basis for this sub-point is found in the Record on pages 51-.....

It should need little argument that such a failure by the Hearing Officer is prejudicial to the registrant and a denial of due process. There are no cases on this point. This Court, in *Linan vs. United States,* 202 F. 2d 693, 694, commented "It goes without saying that an Advisory Report could be so factually incorrect as to vitiate its usefulness, but we have no such situation here." The Court's reference was to the report of the Hearing Officer to the Attorney General. It is the obverse of the same coin described by the Supreme Court in *Simmons vs. United States,* ..... U. S. ....., No. 251, decided March 14, 1955.

D. The conclusions in the two Department of Justice documents are inconsistent with and are not supported by the findings of fact. It is noticeable that the conclusions of the Attorney General and the Hearing Officer find no support in the facts cited in the Resume of the FBI findings [Ex 52] or in the findings of fact in the Attorney General's letter to the appeal board. [Ex 50-51]

That is, the type of facts that are presented afford no legal basis for the adverse conclusion. See *Annett vs. United States,* 205 F. 2d 689, 692. This Court should rule likewise. Such items as infrequent church attendance are no basis. This was well stated in *United States vs. Keefer,* (NDNY, decided Aug. 2, 1954) Stephen W. Brennan, Judge: "The question here is the sincerity of the registrant's belief which must have been influenced by training and experience. Church membership, activity, or lack of them are not determinative. (32 CFR 1622.1(d); *Annett vs. United States,* 205 F. 2d 689)." Nor is willingness to work in a defense plant a basis for denying both of the conscientious objector classifications. *Franks vs. United States,* (9 Cir., 216 F. 2d 266.)

POINT II.

DEFENDANT WAS DENIED DUE PROCESS IN THAT THE LOCAL BOARD FAILED TO HAVE AVAILABLE AN ADVISOR TO REGISTRANTS AND TO HAVE POSTED CONSPICUOUSLY OR ANY PLACE, THE NAMES AND ADDRESSES OF SUCH ADVISOR, AS REQUIRED BY THE REGULATIONS, AND TO THE DEFENDANT'S PREJUDICE.

The factual basis of this point and the argument are set forth in the Opening Brief of the companion case of *Kaline v. United States,* No. 14635. *Chernekoff v. United States,* ..... F. 2d ....., (9 Cir., No. 14370, decided February 24, 1955.

POINT III.

THERE WAS NO PROOF OF THE CRIME CHARGED IN THAT THERE WAS NO PROOF APPELLANT HAD BEEN WARNED OF THE PENALTY FOR REFUSAL TO SUBMIT TO INDUCTION AND THEREAFTER GIVEN THE OPPORTUNITY TO "STEP FORWARD."

The evidence in this case is identical (except for the name of selectee and the date of the above induction ceremony) with that in the case of *Chernekoff vs. United States,* supra. See pages 60 and 61 of the Exhibit.

It is submitted that the Chernekoff decision is dispositive of this point.

POINT IV.

THERE IS NO BASIS IN FACT FOR THE FINAL I-A CLASSIFICATION

The reclassification of appellant from Class I-O to Class I-A was made without basis in fact and was made solely because of invalid and artificial reasons.

The board reclassified appellant on November 14, 1952, from Class I-O to Class I-A. [See page 11 of Exhibit] The only factual matter intervening between the two classification actions (and unquestionably the basis for the latter) is found on pages 27 and 28 of the Exhibit. This fact did not afford a valid basis. A failure to volunteer, by a registrant in a selective service system is not a fair basis for demotion.

When appellant complained of the demotion and asked for a hearing, it was given him on December 5, 1952. The summary of said hearing appears on pages 35 and 36. It reveals that he believed in the use of force and self-defense. He was again reclassified into Class I-A. This Court has condemned such bases for denying a conscientious objector's classification. See *Hinkle vs. United States,* 9 Cir., 216 F. 2d 8, 10; *Blevins vs. United States,* 9 Cir., 217 F. 2d 506; *Clark vs. United States,* 9 Cir., 217 F. 2d 511.

It is evident that if this appellant should have been demoted at all it never should have been to any class lower than to Class I-A-O.

CONCLUSION

The judgment of the Court below should be reversed.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant.

No. 14636

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MITCHELL PAUL DOBRENEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MITCHELL PAUL DOBRENEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on November 10, 1954, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the Armed Forces of the United States [Tr. pp. 3-4].

On November 29, 1954, appellant appeared before the Honorable James M. Carter, United States District Judge. He was arraigned and entered a plea of not guilty. The case was set for trial for December 14, 1954 [Tr. pp. 4-5]. On December 14, 1954, trial was begun in the United States District Court for the Southern District of California before the Honorable James M. Carter, without a jury [Tr. pp. 16-47] and at the close of evidence

and argument appellant was found guilty as charged in the indictment [Tr. p. 47].

On December 20, 1954, appellant was sentenced to the custody of the Attorney General for imprisonment for a period of four years [Tr. p. 48].

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28 United States Code.

II.
STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Secs. 451-470 of this App.], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said Secs.], or rules, regulations or directions made pursuant to this title [said Sec.] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.
STATEMENT OF THE CASE.

The Indictment returned on November 10, 1954 charges that appellant was duly registered with Local Board No. 107. He was thereafter classified I-A and notified to report for induction into the Armed Forces of the United States on August 25, 1954 in Los Angeles, California. The Indictment charges that the defendant at that time and place did knowingly fail and refuse to be inducted into the Armed Forces of the United States [Tr. pp. 3-4].

On November 29, 1954, appellant appeared for arraignment and plea before the Honorable James M. Carter, United States District Judge. Appellant was there represented by his attorney, J. B. Tietz, Esq. Appellant entered a plea of not guilty and his case was set for trial for December 14, 1954 [Tr. pp. 4-5].

On December 14, 1954, trial was held before the Honorable James M. Carter, without a jury and at the close of evidence and argument appellant was found guilty as charged in the Indictment [Tr. p. 47].

On December 20, 1954, appellant was sentenced to the custody of the Attorney General for imprisonment for a period of four years [Tr. p. 48].

Appellant assigns as error the judgment of conviction on the following grounds:

I. The District Court erred in failing to grant the motions for judgment of acquittal.

II. The District Court erred in convicting the appellant and entering a judgment of guilty against him (App. Br. p. 8).

IV.
STATEMENT OF THE FACTS.

On September 15, 1948, Mitchell Paul Dobrenen registered under the Selective Service System with Local Board No. 107, Los Angeles, California [Ex. p. 1]*. He gave his date of birth as May 20, 1929 and was at that time 19 years old.

In May 1949, appellant completed his classification questionnaire and in it signed Series XIV "Conscientious Objection to War," requesting a Special Form for Conscientious Objector [Ex. p. 10]. The form was mailed him on October 26, 1950, completed by appellant and returned to the Local Board [Ex. pp. 14-17]. Without taking further evidence on the matter the Local Board classified appellant IV-E on November 8, 1950 and notified him of that classification [Ex. p. 11].

On November 23, 1951 appellant was classified I-O by a vote of 3 to 0 [Ex. p. 11], and on February 14, 1952, appellant was mailed the revised Special Form for Conscientious Objector which was filed by appellant on February 20, 1952 [Ex. pp. 22-25].

On July 23, 1952, appellant was ordered to report for a physical examination. Appellant took the physical examination, was found acceptable for service and notified of the results on August 18, 1952 [Ex. p. 11]. On October 22, 1952, appellant was mailed an "Application of Volunteer for Civilian Work" [Ex. p. 30]. Appellant did not complete that form but instead wrote a letter

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*Ex. refers to Exhibit No. 1, the appellant's Selective Service file. The page numbers are numbers circled on each page in the file.

to the Local Board, received by them on November 10, 1952, stating, "I am considering taking a job in a Defense Plant (aircraft or other)." Thereafter, on November 14, 1952, appellant was classified I-A by the Local Board by a vote of 2 to 0 [Ex. p. 11].

On December 5, 1953, appellant appeared before the Local Board and was retained in Class I-A by a vote of 3 to 0 [Ex. p. 11]. Appellant appealed his classification [Ex. p. 37].

On Appeal appellant was given an investigation and hearing by the Department of Justice. A copy of the résumé of the investigative report can be found at page 52 of appellant's Selective Service file. It reveals that appellant left a job in 1948 stating that he intended to enter the United States Army and further noted appellant's statement that he was considering taking a job in a defense plant. The letter from the Department of Justice to the Appeal Board can be found at pages 50 and 51 of appellant's Selective Service file and in that letter the Department of Justice recommended that appellant's claim for Conscientious Objector's classification be denied based upon a finding by the hearing officer that appellant's claim was not made in good faith.

The Appeal Board adopted the classification of the Local Board and the recommendation of the Department of Justice and classified appellant I-A on July 6, 1954 by a vote of 3 to 0 [Ex. p. 53]. On August 12, 1954, appellant was sent an Order to Report for Induction, ordering him to report for induction on August 25, 1954 [Ex. p. 57]. On August 25, 1954, appellant reported to the induction station but refused to be inducted into the Armed Services of the United States [Ex. pp. 60-61].

V.
ARGUMENT.

POINT ONE.

A. Appellant Was Not Entitled to Receive a Copy of the Report of the Hearing Officer to the Department of Justice.

Appellant in his brief (p. 9) here argues that a registrant is entitled to receive a copy of the Hearing Officer's report to the Department of Justice. Appellant further states that this was considered by the Supreme Court and that the Court ruled that it constituted a denial of due process, citing *Gonzales v. United States,* 348 U. S. 407. Such was not the holding of the *Gonzales* case. The Court said (p. 417):

> "We hold that the over-all procedure set up in the statute and regulations, designed to be 'fair and just' in their operation, . . . require that the registrant receive a copy of the Justice Department's recommendation and be given a reasonable opportunity to file a reply thereto."

Nothing is said in that opinion about any requirement that a copy of the Hearing Officer's report to the Department be furnished a registrant. There is no authority for such a procedure. Appellant's position with respect to the *Gonzales* case is unsound.

B. Appellant Was Advised of the "Thrust" of the Department of Justice Recommendation to the Appeal Board.

It should be noted that in this case appellant made the record at the trial below that he did not receive a copy of the Attorney General's recommendation to the Appeal Board [Tr. p. 36]. The situation here is thus to be

contrasted with the situation in the companion cases of *Clark v. United States,* No. 14634 and *Kaline v. United States,* No. 14635. In neither of those cases was any such evidence offered.

Thus, appellant here brings himself within the doctrine of *Gonzales v. United States, supra,* and the only remaining question is whether the facts in the *Gonzales* case can be distinguished from the facts here. Appellee believes that they can, for the record shows that the investigation and hearing by the Department of Justice developed no facts of which appellant was not made aware prior to his hearing by the Department of Justice. The résumé of the investigative report given appellant before his hearing [Ex. p. 52], plus the remaining material in appellant's Selective Service file contains all of the information alluded to in the Department's letter of recommendation [Ex. pp. 50-51]. The mandate of the *Gonzales* case, *supra,* is (p. 414):

> "The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions."

In its letter of recommendation the Department adopts the recommendation of the Hearing Officer and states [Ex. 51]:

> "The Hearing Officer concluded from *all the evidence* that the registrant's conscientious-objector claim was not based on religious training and belief and that the registrant's claim is *not made in good faith.*" (Emphasis added.)

Thus the Department's recommendation was not based upon any single fact or factor but was based upon all the evidence and, obviously, upon the demeanor of appellant before the Hearing Officer. *All* the evidence was

known to the appellant and it is difficult to see how appellant might benefit from the right to file a statement before the Appeal Board, when the conclusion reached by the Hearing Officer was that appellant was in bad faith. Appellee submits that on this basis the instant case can be distinguished from the *Gonzales* case. On the other hand, should this Court conclude that where the record reveals that a registrant was not given a copy of the Department's recommendation and that no prejudice need be shown thereby, then appellee agrees that the *Gonzales* case is dispositive of this appeal and the instant case must be reversed. This statement is limited to the case where appellant has made the record at the trial in the District Court that he did not receive a copy of the Department of Justice's recommendation.

C. The Hearing Officer Did Not Fail to Report Any Evidence Material to Appellant's Claim.

In Appellant's Brief (p. 10) appellant makes the contention that the Hearing Officer and the Department of Justice withheld material information concerning appellant's conscientious objector claim. Appellant refers us to the record without citing in his brief any fact so withheld. The record shows [Tr. p. 37] that the appellant testified concerning the letter from the Department of Justice as follows:

> "Well, he states in his report that my limitations to the Molokan Church attending is due—I told him is due to the fact that I don't understand Russian. And that is true. But also I stated that I belong to the Young Russian Christian Association and attend Bible class on Wednesday and Sunday evenings, and service on Sunday and, help—

Q. How often do you attend them? A. Regularly.

Q. You mean every week? A. I miss a few times, yes."

This fact is not specifically alluded to in the letter of the Department of Justice to the Appeal Board, just as many other facts in a Selective Service file are specifically mentioned in that letter. Surely the Department of Justice, in its letter, is not expected to repeat every fact already in a Selective Service file. In the instant case the remarks of appellant at the trial were already contained in his Selective Service file. The résumé of the investigative report [Ex. p. 52] reveals:

> "A leader of the Young Russian Christian Association advises that the registrant regularly attends meetings of that association, as well as the Molokan Church."

And later in the résumé the comments of a fellow employee are recorded:

> "He stated that the registrant attends church and bible study classes regularly."

Thus, the matter complained of by appellant was in his Selective Service file and before the Appeal Board at the time it classified him.

The only other matter that appellant alleges was unreported by the Hearing Officer is found at page 39 of the Transcript of Record:

> "I mentioned to him the fact that on the investigative report there is one point that was not correct. It states that he left a job without notice. But I did talk it over with the superintendent before I left the job. And they said I never did—I didn't go

> back to work over there. But after the first of the following year I worked there for about a month at the same place that I left."

This testimony by appellant appears to allude to the remark in the résumé of the investigative report, "A supervisor stated, however, that the registrant went on his vacation and then started to work for another man and never came back to work again." This matter is not mentioned in the letter of the Department of Justice to the Appeal Board, but there is a sound reason why this is so. Whether appellant did or did not give notice when he left a job has no bearing on his conscientious objector claim. There is no indication anywhere in the record that this statement in the résumé of the investigative report was used against the appellant. Indeed, this Court would take a dim view of any Local or Appeal Board denying a conscientious objector claim on such a tenuous basis.

Appellant in his brief (p. 10) quotes *Linan v. United States,* 202 F. 2d 693, 694, to the effect:

> "It goes without saying that an advisory report could be so factually incorrect as to vitiate its usefulness, but we have no such situation here."

In the instant case there is no evidence whatsoever that the Department's letter is factually incorrect and appellant's claim is only that the Department did not place emphasis on matters that *he* desired them to emphasize.

D. The Recommendation of the Department of Justice Is Supported by the Evidence.

It should be noted at the outset that the recommendation of the Department of Justice is predicated upon a finding of *bad faith* by the registrant [Ex. p. 51]—in other words, a finding that appellant claimed to be a conscientious objector not because he was one, but only in an effort to avoid military service. This is a very important distinction for it removes this case from the category of cases like *Franks v. United States* (9th Cir.), 216 F. 2d 266, cited by appellant. In that case the Court said that if a registrant is *sincere,* his willingness to work in a defense plant would not be inconsistent with the I-A-O classification. In the instant case the Hearing Officer found that appellant was insincere and there was evidence—in addition to his attitude and demeanor before the Hearing Officer—to support that conclusion. The résumé of the investigative report [Ex. p. 52] shows that appellant left his place of employment in September 1948 giving as his reason that he was intending to enter the United States Army. Yet, a few months later in May in 1949, appellant filed his classification questionnaire [Ex. pp. 4-11] wherein he claimed to be a conscientious objector. Again, while appellant expressed his willingness to enter the Service in 1948, when he filed his Special Form for Conscientious Objectors in February 1952, [Ex. pp. 22-25] he asserted that he acquired his beliefs from the Molokan Church and from the Young Russian Christian Association and that he had born into the

Church and joined the Association in 1944. Later, on October 22, 1952, the Local Board sent appellant an "Application of Vounteer for Civilian Work" [Ex. p. 30]. This form was sent appellant in connection with the civilian work program for conscientious objectors. Appellant did not return the form—which of itself is not to be held against him. Instead, however, appellant sent a letter to the Local Board received November 10, 1952 [Ex. p. 28], stating, "I am considering taking a job in a defence Plant (aircraft or other)." After receiving this letter the Local Board, and later the Appeal Board and the Hearing Officer, could hardly help but question the good faith of appellant in his conscientious objector claim.

In his Special Form for Conscientious Objector appellant was asked in Question 6 of Series II [Ex. p. 23], "Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions." Appellant replied, "Regular attendance at church. . . ." Yet, it was revealed in the résumé [Ex. p. 52], in the Hearing Officer's report [Ex. p. 50], and at the trial [Tr. p. 37], that appellant's church attendance was very irregular and limited to marriages and funerals. Appellant's explanation for poor attendance (that the services were in Russian and he did not understand the language) is perhaps a satisfactory one, but the fact remains that his statement in the Special Form for Conscientious Objectors was knowingly *false*.

In *Witmer v. United States,* 348 U. S. 375, the Supreme Court endorsed a searching inquiry into the sincerity and good faith of a claimant for a Conscientious Objector classification. The Court said at pages 381-382:

". . . any fact which casts doubt on the veracity of the registrant is relevant."

In the *Witmer* case the Court upheld the registrant's I-A classification noting among other things that while he claimed to be a conscientious objector he promised to increase his farm production and contribute a satisfactory amount for the war effort.

Thus it is to be seen that the recommendation of the Department of Justice was based upon fact, in addition to the attitude and demeanor of appellant at his hearing before the Hearing Officer.

POINT TWO.

Appellant Was Not Denied Due Process of Law Because the Local Board Did Not Have a Person With the Title of "Advisor."

Here, as in the companion cases of *Clark v. United States,* No. 14634, and *Kaline v. United States,* No. 14635, appellant urges that he was denied due process of law because the Local Board did not have "Advisors to Registrants" under Section 1604.41 of the Selective Service Regulations (32 C. F. R. 1604.41). That section describes the duties of advisors as "to advise and assist registrants in the preparation of questionnaires and other Selective Service forms and to advise the registrants on other matters relating to their liabilities under the Selective Service Law." Colonel Keeley's testimony [Tr. pp. 26-35] reveals that there is no one with the title of advisor, but his testimony also shows that there are 47 Local Boards in Los Angeles County, that there is a Government Appeal Agent for each Local Board to advise and assist registrants, that there are 144 registrars in Los Angeles County who advise and assist registrants, and 151 board

members in Los Angeles County who advise and assist registrants. In addition there are the clerks at each Local Board and the District Coordinator's office available to registrants. The records shows that after each classification appellant was mailed a Notice of Classification [Ex. p. 11]. The record also reveals that that form states in italics, "For advice see your Government Appeal Agent" and further advises the registrant of his rights of appeal [Tr. pp. 31-32]. In addition, Colonel Keeley testified that there has always been some information on the bulletin board at the Local Board office concerning advice [Tr. p. 35]. It might be noted at this point that all the evidence concerning advisors came from an official of Selective Service and the appellant was not asked whether he had ever examined the bulletin board of his Local Board.

Surely, it cannot be said from this record that appellant was denied due process of law because someone did not have the title of "Advisor." No one would argue that if there was no regulation concerning advisors a registrant was denied due process of law, for no right given him under the Act or the Constitution would be invaded. How then can the failure to have someone with that title constitute a denial of due process? Either the Director of Selective Service has created a new constitutional right, or it is a mere irregularity. If it is, at most, a mere irregularity, then there must be some evidence or inference of prejudice to the registrant. There is no evidence in the instant case that appellant was prejudiced and no inference can be drawn to that effect.

Appellant treats this matter as having been disposed of in the case of *Chernekoff v. United States,* 219 F. 2d 721. The *Chernekoff* case does not decide anything with

reference to advisors. It mentions it only in passing and reaches no conclusion. Appellee submits that in the instant case the failure to have someone with the title of advisor is at most an irregularity, that appellant was not prejudiced thereby, and that this point is without merit.

POINT THREE.

The Evidence Shows That Appellant Was Given an Opportunity to Go Through the Induction Ceremony and Refused to Do So.

This Court ruled in the *Chernekoff* case, *supra,* that a registrant must be given a definite opportunity to be inducted or refuse to be inducted into the Armed Services. The Court held in that case that Chernekoff was not given such an opportunity. Appellant in his brief (p. 12) urges that the evidence in the instant case is the same as the evidence in the *Chernekoff* case. However, this Court states in the *Chernekoff* case, page 725:

> ". . . the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless to apply the Special Regulation to the appellant as he had said he would not if asked to so do step forward and become inducted into the Armed Forces."

There is no such evidence in the instant case. There is no evidence that appellant was not asked to take the one step forward and there is no evidence that he was not given the warning prescribed by the Army regulation.

It is presumed that the regulations were followed:

> "A presumption of regularity attaches to official proceedings and acts; it is a well settled rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and *where the contrary is asserted it must be affirmatively*

shown." (*Koch v. United States,* 150 F. 2d 762, 763 —a Selective Service case from the 4th Cir.) (Emphasis added.)

Therefore the presumption exists in this case that appellant was ordered to take the one step forward. It is a presumption that can only be overcome by affirmative evidence to the contrary. At the trial below appellant took the witness stand on his own behalf [Tr. pp. 35-43]. He was represented by his attorney, J. B. Tietz, Esq. Nowhere in appellant's testimony is there any indication that he was not ordered to take the one step forward or given the prescribed warning.

The only evidence offered at the trial supports the conclusion that he was in fact asked to take the one step forward-even excluding for the moment the presumption of regularity. The induction procedures are found in Special Regulation 16-180-1. As a part of that same regulation Induction officials are required in paragraph 27(b)(1) to ask each such registrant to make a signed statement of his refusal to be inducted. This statement is found at page 60 of the Exhibit. Paragraph 27(b)(2) provides for the sending of a notice of such refusal to the United States Attorney and this notice can be found at page 61 of the Exhibit. These steps clearly are the last ones taken by induction officials when a registrant refuses induction and the only inference that can fairly be drawn from the evidence is that appellant refused to take the step forward, thereafter signed a statement to that effect and that the induction officials notified the United States Attorney—all done under the same Special Regulation concerning induction.

Thus the burden was upon the appellant to rebut the Government's showing in the District Court.

It should be noted that this question concerning the induction of appellant was never mentioned in the trial below. No evidence was offered on it by the appellant. It was never mentioned or argued in any motion addressed to the Court. Here for the first time on appeal, it is urged upon the Court. For this reason appellee does not believe that it is a proper question for this Court's consideration.

The reason why appellant was not questioned concerning the events at the induction station and the inherent danger in the Court considering this point now, can be seen when the case of *Bradley v. United States,* 218 F. 2d 657 (9th Cir.), (certiorari granted and reversed on other grounds on March 28, 1955) is examined. In that case the evidence offered by the Government *was exactly the same as the evidence offered here.* As a matter of defense Bradley attempted to show that he was not given an opportunity to refuse induction. This Court ruled his showing was inadequate from his own testimony, even though as a matter of fact he was never asked to take a formal one step forward. In the instant case, had appellant raised this point at the trial of the case of Government could *at least* have produced evidence to fall within the *Bradley* case.

POINT FOUR.

There Was a Basis in Fact for the I-A Classification.

The argument presented here is substantially the same as the argument presented in Section D of Point One of Appellant's Brief and appellee's reply thereto is the same. As heretofore noted, the final I-A classification was based upon *bad faith* by the appellant. This conclusion of bad faith and the I-A classification are based upon facts

shown." (*Koh v. United States,* 150 F. 2d 762, 763 —a Selective Service case from the 4th Cir.) (Emphasis added.

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contained in appellant's Selective Service file: (1) that about the same time appellant was claiming to be a conscientious objector to Selective Service officials he quit a job and gave as his reason that he intended to enter the United States Army, (2) when asked to complete a form concerning civilian work in lieu of induction appellant did not complete the form but sent a note to the draft board stating that he was considering taking a job in a defense plant, (3) appellant stated that he attended church regularly when in fact his attendance was most infrequent and largely limited to funerals and marriages.

See:

Witmer v. United States, supra.

The District Court found that there was a basis in fact for the I-A classification and this finding is supported by substantial evidence.

VI.
CONCLUSION.

The Judgment of the Court below is supported by substantial evidence and its Judgment should be affirmed.

Respectfully submitted,

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